HOW EQUITY CONQUERED COMMON LAW: THE FEDERAL RULES OF CIVIL PROCEDURE IN HISTORICAL PERSPECTIVE

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Professor, Northeastern University School of Law. A.B. 1958, LL.B. 1963, Harvard University. An earlier draft of this Article was delivered as a paper at the May 1986 annual meeting of the Law and Society Association in Chicago, Illinois. I thank the other panelists, Stephen Burbank, William Forbath, and Elizabeth Schneider for their advice and criticism. I presented some of the themes in this Article at the May 1982 Educational Conference of the Justices of the Superior Court Department of the Commonwealth of Massachusetts. Portions of the Article will be part of a book I am writing on the assumptions and historical background of the Federal Rules of Civil Procedure. Many students, colleagues, friends, and manuscript room librarians have helped me with my on-going project. I am grateful to all of them, and particularly to Louise Bowditch, Judith Brown, Stephen Burbank, George Dargo, Daniel Givelber, Paula Goulden, Miriam Horwitz, Justice Benjamin Kaplan, Karl Klare, Michael Meltsner, David Phillips, Tom Rapp, Judith Resnik, Daniel Schaffer, David Shapiro, Fred Solomon, and Berton Subrin, who have aided, encouraged and prodded me along the way. Notwithstanding so much superb guidance, errors surely remain and they are mine.

INTRODUCTION

After almost twenty-five years of battle, Congress passed the Enabling Act of 1934,[1] authorizing the Supreme Court to promulgate the Federal Rules of Civil Procedure ("Federal Rules" or "Rules").[2] The 1938 Federal Rules were heralded as a phenomenal success.[3] Approximately half of the states adopted almost identical rules, and procedural rules in the remainder of the states bear their influence.[4] For decades, most first year law students have learned about civil litigation through a Federal Rules filter.[5]

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[1] Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 (current version at 28 U.S.C. § 2072 (1982)). For a discussion of the battle to enact the Federal Rules, see C. WRIGHT, LAW OF FEDERAL COURTS 402, 403 (4th ed. 1983); 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1003 (1969); Chandler, *Some Major Advances in the Federal Judicial System 1922-1947*, 31 F.R.D. 307, 479-85 (1963); *Supreme Court Adopts Rules for Civil Procedure in Federal District Courts*, 24 A.B.A. J. 97, 99 (1938).

[2] *See* FED. R. CIV. P. 1-86.

[3] *See* 4 C. WRIGHT & A. MILLER, *supra* note 1, § 1008.

[4] *See* C. WRIGHT, *supra* note 1, at 406.

[5] *See, e.g.*, J. COUND, J. FRIEDENTHAL & A. MILLER, CIVIL PROCEDURE CASES AND MATERIALS at xviii (3d ed. 1980); R. FIELD, B. KAPLAN & K. CLERMONT, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE at xix (5th ed. 1984) (reprinting Preface to First Edition (1953)); D. LOUISELL & G. HAZARD, JR., CASES AND MATERIALS ON PLEADING AND PROCEDURE at xix (reprinting Preface to First Edition) (4th ed. 1979); A. SCOTT & R. KENT, CASES AND OTHER MATERIALS ON CIVIL PROCEDURE 3 (1967) (Scott & Simpson rev. ed. 1950).

Now the Federal Rules and adjudication of civil disputes are under attack.[6] Among the key targets are discovery abuse,[7] expense and delay,[8] excessive judicial power and discretion,[9] excessive court rulemaking,[10] unpredictability,[11] litigiousness,[12] an overly adversarial atmosphere,[13] unequal resources of the parties,[14] lack of focus,[15] and

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[6] *See* J. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURE (1977); Bok, *A Flawed System,* HARV. MAG., May-June 1983, at 38; Burbank, *The Rules Enabling Act of 1934,* 130 U. PA. L. REV. 1015, 1018-24 (1982). *See generally* THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE (A. Levin & R. Wheeler eds. 1979) [hereinafter THE POUND CONFERENCE] (proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice).

[7] *See, e.g.,* Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?,* in THE POUND CONFERENCE, *supra* note 6, at 209, 212 (suggesting that the *IBM—Control Data* type litigation raises the question of how discovery of such a "magnitude can possibly be assimilated and welded into an informed decision"); Sherman & Kinnard, *Federal Court Discovery in the '80's—Making the Rules Work,* 95 F.R.D. 245, 246 & nn.1-2 (1982) ("[T]he Federal Rules of Civil Procedure [are] resulting in 'over-discovery.' ").

[8] *See, e.g.,* Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation,* in THE POUND CONFERENCE, *supra* note 6, at 23, 31-32 ("[D]elays and high costs in resolving legal disputes continue to frighten away potential litigants . . .[and i]nordinate delay in criminal trials . . . shock[s] lawyers, judges and social scientists of other countries."); Kirkham, *supra* note 7, at 209, 214 ("Contrary to what might be the first reaction of casual observers, it is the civil case that is building up the backlog in the dockets of our courts.").

[9] *See, e.g.,* G. MCDOWELL, EQUITY AND THE CONSTITUTION: THE SUPREME COURT, EQUITABLE RELIEF, AND PUBLIC POLICY 3 (1982) (noting the trend in the federal judiciary to assume an increasingly active posture); Griswold, *Commentary,* in THE POUND CONFERENCE, *supra* note 6, at 110, 113 ("[J]udges in . . . federal courts are more concerned with doing justice than . . . with making the law intelligible.").

[10] *See, e.g.,* C. WRIGHT, *supra* note 1, at 407-08 (discussing the problems created by local rulemaking for particular districts); 12 C. WRIGHT & A. MILLER, *supra* note 1, § 3152 (discussing the unsatisfactory nature and results of the power to make local rules under FED. R. CIV. P. 83); Burbank, *supra* note 6, at 1018-22 (describing recent inquires into, and questioning of , court rulemaking).

[11] *See, e.g.,* Kirkham, *supra* note 7, at 213 ("A plaintiff who invokes the processes of the court knows, or should know, how and by what he has been injured."); Rifkind, *Are We Asking Too Much of Our Courts?,* in THE POUND CONFERENCE, *supra* note 6, at 51, 64 ("[W]e must move in the direction of simplification of the law. . . . When law is so unpredictable that it ceases to function as a guide to behavior, it is no longer law.").

[12] *See, e.g.,* Rifkind, *supra* note 11, at 53-54 (explaining that the backbreaking pace of litigation, which has increased far beyond a causal relationship to the population, is in part a result of the public perception of the American judge as more than merely a lawmaker); Taylor, *On the Evidence, Americans Would Rather Sue than Settle,* N.Y. Times, July 5, 1981, at E8, col. 1 (noting that according to the Administrative Office of the U.S. Courts, litigation increased by 185% while the population increased by only 25% during the years 1960 to 1980). *But see* Galanter, *Reading the Landscapes of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society,* 31 UCLA L. REV. 4, 5-11 (1983) (arguing that most allegations of litigiousness are unsupported).

[13] *See, e.g.,* Frankel, *The Search for Truth: An Umpireal View,* 123 U. PA. L. REV. 1031, 1036 (1975) (arguing that many of the rules created for adversarial litiga-

formal adjudication itself.[16] Case management, efforts to encourage settlements, and a breathtaking array of alternative dispute resolution mechanisms represent the current major categories of response.[17] There remains speculation, however, as to what factors have contributed to the nature of current civil litigation. Suggested culprits include the explosion in substantive law, photocopying, the types and difficulty of issues brought to courts, the increase in amounts of money involved, and "the sheer number of parties."[18]

Without denigrating these and other factors, this Article concentrates instead on the inherent nature of the Federal Rules and on the basic choice of procedural form made by their promulgators. It advances two theses. First, an historical examination of the evolution of the Federal Rules reveals that rules of equity prevailed over common law procedure. Second, this conquest represents a major contributing factor to many of the most pressing problems in contemporary civil procedure. That the Federal Rules and modern procedure draw heavily on equity is not news. Both the commissioners who drafted the New York Field Code in the mid-nineteenth century and the most influential proponents of procedural reform in the twentieth century, cited, drew upon, and applauded equity procedure.[19] Some contemporary scholars have also acknowledged the modern debt to equity procedure. For ex-

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tion do not facilitate the truth-finding process).

[14] *See, e.g.*, Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 517-20 (1986) (arguing that the Supreme Court has not adequately addressed the issue of lack of resource parity between potential litigants in its rulemaking).

[15] *See* Kirkham, *supra* note 7, at 212.

> When notice pleading dumps into the lap of a court an enormous controversy without the slightest guide to what the court is asked to decide; when discovery—totally unlimited because no issue is framed—mulls over millions of papers, translates them to microfilm and feeds them into computers to find out if they can be shuffled into any relevance . . . we should, I think, consider whether noble experiments have gone awry.

Id.; *see also* Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 732-33 (1975) (suggesting a reexamination of the premise underlying the Federal Rules, i.e., that procedure should be trans-substantive); Resnick, *supra* note 14, at 527-28 (arguing that some recent proposals for adjudicatory reform suggest dissatisfaction with a trans-substantive approach to procedure).

[16] *See, e.g.*, Bok, *supra* note 6, at 40-45 (decrying the emphasis on technical procedure and conflict); Rifkind, *supra* note 11, at 63 ("Many actions are instituted on the basis of a hope that discovery will reveal a claim.").

[17] *See* S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION (1985); Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 257 (1986) [hereinafter Galanter, *Judge As Mediator*]; Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

[18] R. MARCUS & E. SHERMAN, COMPLEX LITIGATION CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE 1, 2, 5-7 (1985).

[19] *See infra* text accompanying notes 132-38, 209-15, 275-83, 305-20.

ample, eleven years ago, Professor Abram Chayes noted how modern civil procedure, in public law cases, looked to equity for remedies.[20] Professor Owen Fiss has eloquently expressed a recent defense to the obligation of judges, particularly federal ones, to use historic equity powers in order to breathe life into sacred constitutional rights and to permit such rights to evolve and expand as society attempts to become more humane.[21]

As important as scholarship like Professors Chayes' and Fiss's has been, however, it does not do justice to the revolutionary character of the decision inherent in the Federal Rules to make equity procedure available for all cases. Nor does it explore what the choice of equity procedure meant historically, how it evolved, and what concerns and problems flow from a procedural system driven by equity. The defense of equity power in constitutional cases designed to restructure public institutions tends to undervalue the problem of how to translate rights, constitutional or otherwise, into daily realities for the bulk of citizens.[22] Aspects of common law procedure and thought, not equity, may be required to help deliver or vindicate rights, now that equity has opened a new rights frontier. Focusing on the historical currents that resulted in the Federal Rules will illustrate what an enormous distance was traveled, how one-sided the procedural choices became, and the problems implicit in those choices. Perhaps exploring where one came from can help clarify where one may wish to go.

Part I of this Article first looks at the major components of common law and equity procedure, and then examines the domination of an equity mentality in the Federal Rules. Part II explores the American procedural experience before the twentieth century, and demonstrates how David Dudley Field and his 1848 New York Code were tied to a common law procedural outlook. Part III concentrates on Roscoe Pound (who initiated the twentieth century procedural reform ef-

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[20] *See* Chayes, *The Role of the Judge in Public Law Litigation,* 89 HARV. L. REV. 1281, 1292-96 (1976).

[21] *See, e.g.,* Fiss, *The Social and Political Foundations of Adjudication,* 6 LAW & HUM. BEHAV. 121 (1982) (describing "structural reform" litigation); Fiss, *Forward: The Forms of Justice,* 93 HARV. L. REV. 1 (1979) (similar description and analysis of "structural reform" litigation).

[22] *See, e.g.,* Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189, 217-32 (1973) (Powell, J., dissenting in part) (arguing that the Court's de jure/de facto segregation distinction should be abandoned because it fails to aid the implementation of integration over segregation); Brown, Givelber & Subrin, *Treating Blacks As If They Were White: Problems of Definition and Proof in Section 1982 Cases,* 124 U. PA. L. REV. 1 (1975) (perceiving § 1982 litigation as proceeding in a fashion that retards the translation of rights into reality, and therefore, suggesting the need for a systematization of the cause of action through a diagram of its elements, presumptions, and inferences).

fort), Thomas Shelton (who led the American Bar Association ("ABA") Enabling Act Movement), and Charles Clark (the major draftsman of the Federal Rules). Through understanding these men and the interests they represented, one can see that we did not stumble into an equity system; people with identifiable agendas wanted it. Part IV examines how the Federal Rules advocate rejected methods that might have helped balance and control their equity procedure, why the methods of confining the system failed, and why current approaches to redress the imbalance of an equity-dominated system will also fail. It concludes with a summary of fundamental constraints rejected by the advocates of uniform federal rules of procedure. My goal is to rescue some quite profound voices from the wilderness.

I. COMMON LAW, EQUITY, AND THE FEDERAL RULES OF CIVIL PROCEDURE

Much of the formal litigation in England historically took place in a two-court system: "common law" or "law" courts, and "Chancery" or "equity" courts.[23] Although they were complementary, law and equity courts each had a distinct procedural system, jurisprudence, and outlook. The development of contemporary American civil procedure cannot be understood without acknowledging these differences. The more formalized common law procedure has been so ridiculed that we tend to ignore its development to meet important needs, some of which still endure, and that many of its underlying purposes still make sense. Conversely, especially during this century, equity has been touted in ways that obscure the underlying drawbacks to its use as the procedural model.

A. *Common Law Procedure*

The law courts had three identifying characteristics: the writ or formulary system, the jury, and single issue pleading.[24] Each matured in England between the thirteenth and sixteenth centuries and later influenced legal development in America. Each represented a means of confining and focusing disputes, rationalizing and organizing law, and of applying rules in an orderly, consistent, and predictable manner.

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[23] A rich variety of other courts also existed. *See* 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 1047-89 (W. Lewis ed. 1898).

[24] *See* S. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 26-46 (1969). The three Central law courts were King's Bench, Exchequer, and Common Pleas. For a description of the courts, see *id.* at 20-22; T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 139-56 (5th ed. 1956).

Subjects of the king, desirous of royal aid, would bring grievances to the Chancellor, who served as the king's secretary, adviser, and agent. The Chancellor's staff, the Chancery, sold writs, "royal order(s) which authorized a court to hear a case and instructed a sheriff to secure the attendance of the defendant."[25] Clerks organized complaints into categories, and particular writs came to be used for particular types of oft-repeated complaints.[26] Over time, "plaintiffs could not get to the court without a chancery writ, and the formulae of the writs, mostly composed in the thirteenth century to describe the claims then commonly accepted, slowly became precedents which could not easily be altered or added to."[27]

The writs gradually began to carry with them notions of what events would permit what result or remedy. Ultimately, an organized body of what is now commonly called substantive law evolved from the writs.[28] Distinct procedural characteristics developed for different writs. Each writ implied a wide range of procedural, remedial, and evidentiary incidents, such as subject matter and personal jurisdiction, burden of proof, and methods of execution.[29] The writ of novel disseisin, for instance, was designed to provide for the rapid ejection of one who was wrongfully on the plaintiff's land. It was accompanied by more expeditious procedures than the writ of right, which decided the ultimate issue of ownership.[30] The writ system also confined adjudication. The

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[25] S. MILSOM, *supra* note 24, at 22.

[26] *See* T. PLUCKNETT, *supra* note 24, at 353-54.

[27] S. MILSOM, *supra* note 24, at 25.

[28] *See* H. MAINE, DISSERTATIONS ON EARLY LAW AND CUSTOM 389 (1886) ("So great is the ascendancy of the Law of Actions in the infancy of the Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure . . . .").

[29] *See* F. MAITLAND, EQUITY ALSO THE FORMS OF ACTION AT COMMON LAW, TWO COURSES OF LECTURES 296-98 (A. Chaytor & W. Whittaker eds. 1920).

[30] *See id.* at 318-23. "Seisin" has a meaning similar to, but different from, possession. Feudalism renders dysfunctional our concepts of "possession," "right," or "title." *See* S. MILSOM, *supra* note 24, at 103-05. Other examples of the common law attempt to integrate substantive rights and methods for their enforcement can be seen in the writs of covenant and replevin. In covenant, the requirement of a seal for proof probably improved the likelihood that only honest claims were pursued. *See id.* at 213. In replevin, the distrainee (the plaintiff who says that his goods were wrongfully taken) is entitled to immediate possession of the goods upon giving a "bond for the value of the chattels, conditioned on his loss of the suit and failure to return the chattels to the defendant." S. COHN, THE COMMON-LAW FOUNDATION OF CIVIL PROCEDURE 19 (1971); *see* F. MAITLAND, *supra* note 29, at 355. This, too, should discourage frivolous suits, as well as self-help. For contemporary suggestions to integrate different areas of substantive law with different procedures, see Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma,* 47 S. CAL. L. REV. 842, 900 (1974); Sander, *Varieties of Dispute Processing,* in THE POUND CONFERENCE, *supra* note 6, at 65.

obligation to choose only one writ at a time limited the scope of law suits, as did rules severely restricting the joinder of plaintiffs and defendants.[31]

Like the evolution of the writ, the development of the jury trial represented movement toward confinement, focus, rationality, and a legal system of defined rules to regulate human conduct. Before the development of the jury, parties at common law were tested before God through ordeal, battle, or the swearing of "compurgators."[32] With the inception of juries, disputants began telling their respective stories to their peers, who determined which version was correct. Because human beings (rather than God) were to hear and decide the case, an individual might have found it favorable to present facts that might have changed the minds of the now-human dispute resolvers. Once the idea emerged that a special set of circumstances could necessitate a different verdict, the seed of substantive law had been planted: specific facts would trigger specific legal consequences. The jury concept brought with it, therefore, the idea of consistent and predictable law application by human beings, rather than divine justice by mysterious means. It now became logical for a trial to focus on proof relevant to those specific facts at issue that carry with them a legal consequence.[33]

Common law also evolved as a technical pleading system designed to resolve a single issue. When it became apparent that specific facts should bring about specific legal results, it made sense to determine whether the plaintiff's story, if true, would permit recovery and, if so, what facts were in dispute. Assuming the defendant did not contest that he was properly brought before the correct court, but still disputed the case, the common law procedure permitted first a demurrer, and then confession and avoidance, or traverse.[34] Under single issue pleading, the parties pleaded back and forth until one side either demurred, resulting in a legal issue, or traversed, resulting in a factual issue.[35]

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[31] *See* F. JAMES, JR. & G. HAZARD, JR., CIVIL PROCEDURE 462 (3d ed. 1985) [hereinafter F. JAMES & G. HAZARD (3d)]; F. MAITLAND, *supra* note 29, at 298-99.

[32] *See* H. LEA, SUPERSTITION AND FORCE 252, 279 (3d ed. 1878); T. PLUCKNETT, *supra* note 24, at 114-18; C. REMBAR, THE LAW OF THE LAND: THE EVOLUTION OF OUR LEGAL SYSTEM 186-87 (1980).

[33] *See* S. MILSOM, *supra* note 24, at 30-32; T. PLUCKNETT, *supra* note 24, at 124-30.

[34] *See* S. COHN, *supra* note 30, at 47; T. PLUCKNETT, *supra* note 24, at 409-10, 413-14.

[35] *See* 1 J. CHITTY, TREATISE ON PLEADING 261-63 (1879); S. COHN, *supra* note 30, at 46-48; T. PLUCKNETT, *supra* note 24, at 405-15; C. REMBAR, *supra* note 32, at 224-28. *See generally* H. STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS: COMPRISING A SUMMARY VIEW OF THE WHOLE PROCEEDINGS IN A SUIT AT LAW (1824) (discussing the "science" of pleading under the common law system).

Lawyers well into the nineteenth century on both sides of the Atlantic viewed the "common law" procedural system as comprising the writ or form of action, the jury, and the technical pleading requirements that attempted to reduce cases to a single issue. This system became rigid and rarefied.[36] Due to the countless pleading rules, a party could easily lose on technical grounds.[37] Lawyers had to analogize to known writs and use "fictions" because of the rigidity of some forms of action.[38] Lawyers also found other ways around the common law rigidities, such as asserting the common count and general denials, which made a mockery of the common law's attempt to define, classify, and clarify.[39]

The common law procedural system, nonetheless, had its virtues. The formality and confining nature of the writs and pleading rules permitted judges, who were centralized in London, to attempt (and often to succeed) in forging a consistent, rational body of law, which provided lawyers with analytical cubbyholes.[40] The common law system, furthermore, permitted increased participation by the lay community. If the pleading resulted in the need for a factual determination, it could be sent to the county where the parties resided. A judge from the Central Court could easily carry the papers, reduced to a single issue, in his satchel, and convene a jury at an "assize."

The focusing of cases to a single issue also aided both judges and lawyers in their effort to understand and apply the law, as well as assisting lay jurors in resolving factual disputes. The use of known writs, each with their own process, substance, and remedy, allowed the integration of the ends sought and means used. The system presumably achieved—or at least tried to achieve—some degree of predictability about what legal consequences citizens could expect to flow from their conduct. Comparing the traditional common law system to that of his own day, Maitland (1850-1906) commented on the common law's attempt to control discretion: "Now-a-days all is regulated by general

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[36] *See* T. PLUCKNETT, *supra* note 24, at 410.

[37] *See* J. COUND, J. FRIEDENTHAL & A. MILLER, *supra* note 5, at 331; C. REMBAR, *supra* note 32, at 225-31. On the number and subtlety of writs, see 1 F. POLLACK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 564-67 (2d ed., reissued 1968).

[38] *See, e.g.*, C. REMBAR, *supra* note 32, at 224.

[39] *See* J. COUND, J. FRIEDENTHAL & A. MILLER, *supra* note 5, at 338-39; F. MAITLAND, *supra* note 29, at 300-01; S. MILSOM, *supra* note 24, at 247-52; C. REMBAR, *supra* note 32, at 207-12; Bowen, *Progress in the Administration of Justice During the Victorian Period*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 516, 520-21 (1907).

[40] For an example of the relationship of writs and common law pleading to the development of the legal profession, see S. MILSOM, *supra* note 24, at 28-42; T. PLUCKNETT, *supra* note 24, at 216-17.

rules with a wide discretion left in the Court. In the Middle Ages discretion is entirely excluded; all is to be fixed by iron rules."[41]

B. *Equity Procedure*

By the early sixteenth century it was apparent that the common law system was accompanied by a substantially different one called equity. Equity was administered by the Chancellor, as distinguished from the three central common law courts with their common law judges.[42] The contemporary English historian, Milsom, explains that one cannot find the precise beginning of the Equity Court, for, in a sense, it had been there all along.[43] As previously noted, although the writs had started as individualized commands from the Chancellor, by the fourteenth century several of the writs had become routinized.[44] Grievants, however, continued to petition the Chancellor for assistance in unusual circumstances, such as where the petitioner was aged or ill, or his adversary particularly influential.[45] Whereas the writ and single issue common law system forced disputes into narrow cubbyholes, these petitions to the Chancellor tended to tell more of the story behind a dispute. Bills in equity were written to persuade the Chancellor to relieve the petitioner from an alleged injustice that would result from rigorous application of the common law.[46] The bill in equity became the procedural vehicle for the exceptional case. The main staples of Chancery jurisdiction became the broader and deeper reality behind appearances, and the subtleties forbidden by the formalized writ, such as fraud, mistake, and fiduciary relationships.[47]

The Equity Court became known as the Court of Conscience. Like ecclesiastical courts, it operated directly on the defendant's con-

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[41] F. MAITLAND, *supra* note 29, at 298.

[42] Around 1523, Christopher St. Germain explored the relationship of equity to the common law system in *Dialogues Between a Doctor of Divinity and a Student of the Common Law.* For a discussion of this work and its impact, see S. MILSOM, *supra* note 24, at 79-83; T. PLUCKNETT, *supra* note 24, at 279-80.

[43] *See* S. MILSOM, *supra* note 24, at 74-87.

[44] *See supra* notes 25-27 and accompanying text.

[45] *See* F. MAITLAND, *supra* note 29, at 4-5; S. MILSOM, *supra* note 24, at 74-75, 77.

[46] *See* F. MAITLAND, *supra* note 29, at 4-5; S. MILSOM, *supra* note 24, at 74-79; T. PLUCKNETT, *supra* note 24, at 688-89.

[47] *See* F. MAITLAND, *supra* note 29, at 7-8. Maitland illustrates equity jurisdiction with "an old rhyme": " 'These three give place in court of conscience/Fraud, accident, and breach of confidence.' " *Id.* at 7. The idea that more formal legal rules should be accompanied by a more discretionary approach in order to prevent injustice was not new. On the Jewish notion of justice and mercy, see 10 ENCYCLOPEADIA JUDAICA 476, 476-77 (1977). On the Greek notion of *epieikeia,* connoting "clemency, leniency, indulgence, or forgiveness," see G. MCDOWELL, *supra* note 9, at 15.

science.[48] This had far-reaching repercussions. In a common law suit, the self-interest of the parties was thought too great to permit them to testify.[49] The Chancellor, however, compelled the defendant personally to come before him to answer under oath each sentence of the petitioner's bill. There were also questions attached. This was a precursor to modern pretrial discovery.[50] Equity did not take testimony in open court, but relied on documents, such as the defendant's answers to questions.[51]

As the defendant was before the Chancellor to have his conscience searched, the Chancellor could order him personally to perform or not perform a specific act.[52] Such authority was necessary to enforce a trust. If the defendant was found to be holding land in trust for another, he could be compelled to give the use and profit of the property to the beneficiary.[53] The ability to fashion specific relief, both to undo past wrongs and to regulate future conduct, also distinguished equity from the law courts, which in most instances awarded only money damages.[54]

The Chancellors were usually bishops, and so the term "conscience" again became associated with equity.[55] Notwithstanding the writs and the common law that developed around the writs, the Chancellor was expected to consider all of the circumstances and interests of all affected parties. He consequently was also to consider the larger moral issues and questions of fairness.[56] The equity system did not revolve around the search for a single issue. Multiple parties could, and often had to, be joined.[57] There was now a considerably larger litiga-

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[48] *See* 5 W. HOLDSWORTH, A HISTORY OF THE COMMON LAW 216 (2nd ed. 1937); S. MILSOM, *supra* note 24, at 81-82.

[49] *See* T. PLUCKNETT, *supra* note 24, at 689.

[50] *See* F. JAMES, JR. & G. HAZARD, JR., CIVIL PROCEDURE 171-72 (2d ed. 1977) [hereinafter F. JAMES & G. HAZARD (2d)].

[51] *See id.;* C. REMBAR, *supra* note 32, at 298; Bowen, *supra* note 39, at 524-25.

[52] *See* S. MILSOM, *supra* note 24, at 81-82; T. PLUCKNETT, *supra* note 24, at 689. It is appropriate to use "he" for defendants because during this period women were usually treated as incompetent to be parties to a suit. *See* F. JAMES & G. HAZARD (2d), *supra* note 50, at 415.

[53] *See* C. REMBAR, *supra* note 32, at 296.

[54] *See* L. FRIEDMAN, A HISTORY OF AMERICAN LAW 22 (1973); F. MAITLAND, *supra* note 29, at 254-67; S. MILSOM, *supra* note 24, at 81-82; Bowen, *supra* note 39, at 517-18.

[55] *See* T. PLUCKNETT, *supra* note 24, at 685-86, who wrote: "[T]he ecclesiastical chancellors were certainly not common lawyers, and it must have been a perfectly natural instinct, then as now, for a bishop when faced by a conflict between law and morals, to decide upon lines of morality rather than technical law."

[56] *See* S. MILSOM, *supra* note 24, at 79-81. Sixteenth century theorists recognized "the appeal to the chancellor [as being] for the single [divine] justice, in circumstances in which the human [common law] machinery was going to fail." *Id.* at 80.

[57] *See* Bowen, *supra* note 39, at 516, 523-31 ("[I]t was a necessary maxim of the

tion package. This less individualized justice demanded and resulted in more discretionary power lodged in a single Chancellor, who resolved—often in a most leisurely manner—issues both of law and fact.[58] The lay jury was normally excluded.[59]

By the sixteenth century, the development of common law jurisprudence thus reflected a very different legal consciousness from equity. Common law was the more confining, rigid, and predictable system; equity was more flexible, discretionary, and individualized. Just as the common law procedural rules and the growth of common law rights were related, so too were the wide-open equity procedures related to the scope of the Chancellor's discretion and his ability to create new legal principles. In equity, the Chancellor was required to look at more parties, issues, documents, and potential remedies, but he was less bound by precedent and was permitted to determine both questions of facts and law.[60] The equity approach distinctly differed from the writ-dominated system. Judges were given more power by being released from confinement to a single writ, a single form of action, and a single issue, nor by being as bound by precedent; and they did not share power with lay juries.[61]

In assessing the place of equity practice in the overall legal system, it is critical to realize the extent to which the common law system operated as a brake. One could not turn to equity if there was an adequate remedy at law.[62] Equity grew interstitially, to fill in the gaps of substantive common law (such as the absence of law relating to trusts) and to provide a broader array of remedies—specific performance, injunctions, and accountings. Equity thus provided a "gloss" or "appendix" to the more structured common law.[63] An expansive equity practice developed as a necessary companion to common law.[64]

Court of Chancery that all parties interested in the result must be parties to the suit.").

[58] *See* S. MILSOM, *supra* note 24, at 82-83 ("It is a regular institution, but not applying rules; rather it is using its discretion to disturb their effect.").

The length of equitable proceedings was notorious. This aspect of equitable proceedings has been attributed to the court's desire to effect complete rather than merely substantial justice, as well as the self-interest of Chancery officials who profited from lengthy suits. *See* 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 373-74 (3rd ed. 1944).

[59] *See* S. COHN, *supra* note 30, at 1.

[60] *See* C. REMBAR, *supra* note 32, at 275.

[61] For summaries of the different approaches of law and equity, see L. FRIEDMAN, *supra* note 54, at 21-23; F. JAMES & G. HAZARD (3rd), *supra* note 31, at 11-14; S. MILSOM, *supra* note 24, at 74-83.

[62] *See* R. HUGHES, HANDBOOK OF JURISDICTION AND PROCEDURE IN UNITED STATES COURTS 418-20 (2d ed. 1913).

[63] *See* F. MAITLAND, *supra* note 29, at 18-19.

[64] On occasion, a new equity rule would become part of the law applied in the common law courts. *See* F. JAMES & G. HAZARD (3d), *supra* note 31, at 16; T.

The disparities between law and equity were not always stark. Not all common law declarations were incisive, and common law pleading did not always isolate tidy issues; sometimes there was joinder of parties or issues. Conversely, equity often developed its own formal rules of both substance and process.[65] It is true, however, that when looked at as a whole, the common law writ/single issue system took seriously the importance of defining the case; integrating forms of action with procedure and remedy; confining the size of disputes; and articulating the legal and factual issues. In short, a goal of the common law was predictability by identifying fact patterns that would have clearly articulated consequences.

This Article will explore flaws in equity and law when we examine the evolution of procedure in America. It is important to note here, however, that from the beginning, equity's expansiveness led to larger cases—and, consequently, more parties, issues, and documents, more costs, and longer delays—than were customary with common law practice.[66] This is not to minimize the problems associated with common law practice, or the need for a more flexible counterpart to the common law. The point is that a less structured multiparty, multi-issue practice has always had significant burdens.[67]

PLUCKNETT, *supra* note 24, at 689.

[65] For examples of permissible joinder of parties and forms of action at common law, see F. JAMES & G. HAZARD (2d), *supra* note 50, at 452-54, 463-64. Much of the writing of the legal realists emphasized the discretion inherent in all judging and dispute resolution. *See, e.g.*, the Chapters on "Rule-Skepticism," "Fact-Skepticism," and "The Prediction of Decisions" in W. RUMBLE, AMERICAN LEGAL REALISM: SKEPTICISM, REFORM AND THE JUDICIAL PROCESS 48-182 (1968) (examining the realist movement's revolt against classical jurisprudence). *See infra* note 131 (on how equity practice became complicated).

[66] *See, e.g.*, 1 W. HOLDSWORTH, *supra* note 58, at 425-28; C. REMBAR, *supra* note 32, at 298-303; R. WALKER AND M. WALKER, THE ENGLISH LEGAL SYSTEM 31 (3rd ed. 1972); Bowen, *supra* note 39, at 524-27. One commentator has noted that some of the problem in equity

> no doubt, was due to a defect which equity never cured—the theory that Chancery was a one-man court, which soon came to mean that a single Chancellor was unable to keep up with the business of the court. Not until 1913 do we find the appointment of a Vice-Chancellor.

T. PLUCKNETT, *supra* note 24, at 689 (footnote omitted). For complaints about equity in America, see *infra* notes 90-106 and accompanying text.

[67] Equity also became associated with monarchy and nondemocratic principles, because of its inherent discretion, rejection of the lay jury, and clashes with Parliament and the law courts. *See* F. JAMES & G. HAZARD (3d), *supra* note 31, at 14-16. *See generally* Dawson, *Coke and Ellesmere Disinterred: The Attack on the Chancery in 1616*, 36 ILL. L. REV. 127 (1941) (exploring the power struggle between the courts of common law and equity in the 17th century).

C. *The Equity-Dominated Federal Rules of Civil Procedure*

In the twentieth century, Federal Rules proponents emphasized that they were not suggesting new procedures. They rather insisted that they were just combining the best and most enlightened rules adopted elsewhere.[68] For the most part the proponents were right, but their argument ignores the implications of their choices regarding what the "best" rules were. The underlying philosophy of, and procedural choices embodied in, the Federal Rules were almost universally drawn from equity rather than common law.[69] The expansive and flexible aspects of equity are all implicit in the Federal Rules. Before the Rules, equity procedure and jurisprudence historically had applied to only a small percentage of the totality of litigation.[70] Thus the drafters made an enormous change: in effect the tail of historic adjudication was now wagging the dog. Moreover, the Federal Rules went beyond equity's flexibility and permissiveness in pleading, joinder, and discovery.[71]

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[68] *See, e.g.,* AMERICAN BAR ASSOCIATION, FEDERAL RULES OF CIVIL PROCEDURE (E. Hammond ed. 1939) (proceedings of the Institute on the Federal Rules of Civil Procedure and the Symposium on the Federal Rules of Civil Procedure). For a description of the sources of various rules, *see Hearings on the Rules of Civil Procedure for the District Courts of the United States: Hearings Before the House Comm. on the Judiciary,* 75th Cong., 3d Sess. 4 (1938) [hereinafter *1938 House Hearings*] (statement of Homer Cummings, U.S. Attorney General); AMERICAN BAR ASSOCIATION, *supra,* at 28, 32 (statement of Edgar B. Tolman, member of the drafting committees); *id.* at 45, 51, 54-55, 57, 59, 66 (statement of Charles E. Clark, Dean of Yale Law School).

[69] *See 1938 House Hearings, supra* note 68, at 73 (statement of Edgar B. Tolman); P. CARRINGTON & B. BABCOCK, CIVIL PROCEDURE 19, 20 (2d ed. 1977); 4 C. WRIGHT & A. MILLER, *supra* note 1, § 1008; Clark & Moore, *A New Federal Civil Procedure I: The Background,* 44 YALE L.J. 387, 434-35 (1935) [hereinafter Clark & Moore I]; Holtzoff, *Origin and Sources of the Federal Rules of Civil Procedure,* 30 N.Y.U. L. REV. 1057, 1058 (1955).

[70] *See* Arnold, *A Historical Inquiry Into the Right to Trial By Jury in Complex Civil Litigation,* 128 U. PA. L. REV. 829, 832-38 (1982).

[71] *Compare* Rule 25 (Bill of Complaint—Contents) of the Federal Equity Rules of 1912 in J. HOPKINS, THE NEW FEDERAL EQUITY RULES (1913) [hereinafter FED. EQ. R.] (requiring, inter alia, "ultimate facts") *with* FED. R. CIV. P. 8(a)(2) (General Rules of Pleading: Claims for Relief); *compare* FED. EQ. R. 26 (Joinder of Causes of Action) (requiring that joined causes of action be "cognizable in equity," and that "when there is more than one plaintiff, the causes of action joined must be joint . . . .") *with* FED. R. CIV. P. 18(a) (Joinder of Claims and Remedies: Joinder of Claims) and 20(a) (Permissive Joinder of Parties: Permissive Joinder); *compare* FED. EQ. R. 47 (Depositions—To Be Taken in Exceptional Instances) (permitting oral depositions only "upon application of either party, when allowed by statute, or for good and exceptional cause . . . .") *with* FED. R. CIV. P. 30(a) (Depositions Upon Oral Examination: When Depositions May be Taken); and *compare* FED. EQ. R. 58 (Discovery--Interrogatories—Inspection and Production of Documents—Admission of Execution or Genuineness) (limiting interrogatories to "facts and documents material to the support or defense of the cause") *with* FED. R. CIV. P. 26(b)(1) (General Provisions Governing Discovery: Discovery Scope and Limits in General).

The purpose of this Article is not to show the derivation of each Federal Rule. The drafters of the Rules, treatises, and articles have already done this.[72] This Article, however, will establish how different people and various historical currents ultimately joined together in a historic surge in the direction of an equity mentality. The result is played out in the Federal Rules in a number of different but interrelated ways: ease of pleading;[73] broad joinder;[74] expansive discovery;[75] greater judicial power and discretion;[76] flexible remedies;[77] latitude for

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[72] They show the extensive borrowings from equity, particularly from the Federal Equity Rules of 1912, *supra* note 71. *See, e.g.*, ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE, NOTES TO THE RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES app. at 83, 84 table 1 (March 1938) (showing "Equity Rules to which references are made in the notes to the Federal Rules of Civil Procedure"); C. WRIGHT & A. MILLER, *supra* note 1 (providing a rule by rule discussion); Holtzoff, *supra* note 69, at 1058.

[73] *See, e.g.*, FED. R. CIV. P. 2 (One Form of Action), 8(a), (c), (e) (General Rules of Pleading: Claims for Relief, Affirmative Defenses, Pleading to be Concise and Direct; Consistency), 11 (Signing of Pleadings, Motions, and Other Papers; Sanctions), 15 (Amended and Supplemental Pleadings). For a comparison to previous American procedure, see *infra* text accompanying notes 93-97, 143-49. For a criticism of the leniency in pleading, see McCaskill, *The Modern Philosophy of Pleading: A Dialogue Outside the Shades*, 38 A.B.A. J. 123, 124-25 (1952) [hereinafter McCaskill, *Philosophy of Pleading*].

[74] *See, e.g.*, FED. R. CIV. P. 13 (Counterclaim and Cross-Claim), 14 (Third-Party Practice), 15 (Amended and Supplemental Pleadings), 18 (Joinder of Claims and Remedies), 19 (Joinder of Persons Needed for Just Adjudication), 20 (Permissive Joinder of Parties), 22 (Interpleader), 23 (Class Actions), 24 (Intervention), 25 (Substitution of Parties), 42 (Consolidation; Separate Trials). For comparative code provisions, see *infra* text accompanying notes 150-51.

[75] *See* FED. R. CIV. P. 26-37 (Depositions and Discovery). For contemporary discovery problems, see *supra* note 7. For comparative code provisions, see *infra* text accompanying notes 152-57.

[76] One lawyer complains: "It has become increasingly clear that if one can but find him, there is a federal judge anywhere who will order nearly anything." Publius, *Let's Kill All the Lawyers*, WASHINGTONIAN, Mar. 1981, at 67. For comments on the enlarged, amorphous, and multi-issued nature of lawsuits and the vast amount of law available to lawyers and judges, see discussions in THE POUND CONFERENCE, *supra* note 6. Examples of Federal Rules of Civil Procedure that lend themselves to, or specifically provide for, judicial discretion include: 1, 8(a), (e), 11, 12(e), 13, 14, 15, 16, 19(b), 20, 23, 26(b)(1), (c), (d), 35(a), 37(a)(4), (b)(2), 39(b), 41(a)(2), 42(a), (b), 49, 50(a), (b), 53(b), 54(b), 54(c), 55(c), 56(c), 59(a)(1), 50(b)(1), 60(b)(6), 61, 62(b), 65(c). I have used current numbers, but for the most part, they are identical or similar to the 1938 rules. The case law rarely has provided more predictability or better defined standards than the rules, as is demonstrated by looking up the aforementioned rules in J. MOORE, MOORE'S FEDERAL PRACTICE (2nd ed. 1984), or C. WRIGHT & A. MILLER, *supra* note 1. One usually finds in these treatises a wide range of cases offering a baffling array of interpretations that usually provide no more certainty than the vague rule itself. On case management, see *supra* note 17.

[77] *See* Chayes, *supra* note 20, at 1292-96; Oakes, *"A Plague of Lawyers?": Law and the Public Interest*, 2 VT. L. REV. 7, 12-15 (1977).

lawyers;[78] control over juries;[79] reliance on professional experts;[80] reliance on documentation;[81] and disengagement of substance, procedure, and remedy.[82] This combination of procedural factors contributes to a procedural system and view of the law that markedly differs from ei-

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[78] " 'Americans increasingly define as legal problems many forms of hurts and distresses they once would have accepted as endemic to an imperfect world or at all events as the responsibility of institutions other than courts.' " Goldstein, *A Dramatic Rise in Lawsuits and Costs Concerns Bar,* N.Y. Times, May 18, 1977, at A1, col. 3, B9, col. 1 (quoting Professor Maurice Rosenberg, a Columbia University law professor); *see also* J. LIEBERMAN, THE LITIGIOUS SOCIETY 18 (1981) (noting the role of attorneys in fostering litigation); Carpenter, *The Pampered Poodle and Other Trivia,* 6 LITIGATION 3 (Summer 1980) (discussing the enormous magnitude of trivial litigation); Taylor, *supra* note 12 (stating that lawyers find ways to keep each other busy based on their training to find potential conflicts in the simplest of relationships). At least one commentator, however, has cautioned about claims of litigiousness. *See* Galanter, *supra* note 12, at 36-69.

[79] Litigants must now claim the right to a jury trial at an earlier stage of the litigation than had been the norm. *See* FED. R. CIV. P. 38(b) (Jury Trial of Right; Demand). For the more jury-protective provision of the Field Code, see 1848 N.Y. Laws, ch. 379, § 221 [hereinafter 1848 CODE]; *see also* FED. R. CIV. P. 50(a), (b) (Motion for a Direct Verdict and Judgment Notwithstanding the Verdict), 56 (Summary Judgment). On previous constitutional doubts as to directed verdict and judgment n.o.v., see Galloway v. United States, 319 U.S. 372, 396-411 (1943) (Black, J., dissenting); Slocum v. New York Life Ins. Co., 228 U.S. 364, 376-400 (1913). Cases such as *Galloway,* which stated that the practice of granting a directed verdict was approved explicitly in the Federal Rules of Civil Procedure, *see* 319 U.S. at 389, were considered by some as making inroads on the quality of the right to a jury trial, notwithstanding the language in the Enabling Act (currently codified at 28 U.S.C. § 2072 (1982)) that the rules should not "abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

It is true that some cases under the Federal Rules are jury-protective. *See, e.g.,* Ross v. Bernhard, 396 U.S. 531 (1970); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Beacon Theatres, Inc., v. Westover, 359 U.S. 500 (1959). These cases do not alter the essential point, however, that the major thrust of the Federal rules is pro-judge rather than anti-jury. *See infra* text accompanying notes 512-13.

[80] For example, under the Enabling Act of 1934, the Supreme Court and the Advisory Committee, rather than Congress or state legislatures, formulated the procedural rules. Those rules empowered judges at the expense of juries. The rules facilitated the role of courts to deal with larger societal problems, perhaps making it easier for other branches to refrain from resolving those issues. *See, e.g.,* Chayes, *supra* note 20, at 1288-1302; Oakes, *supra* note 77, at 8-10. Public policy cases, as well as personal injury and commercial cases, in turn increasingly relied on experts to aid the court, both because lawyers prepared and presented the cases, and because experts were widely utilized as witnesses.

[81] *See* Pope, *Rule 34: Controlling the Paper Avalanche,* 7 LITIGATION 28, 28-29 (Spring 1981); Sherman & Kinnard, *supra* note 7, at 246; *Those #*X/!!! Lawyers,* TIME, April 10, 1978, at 58-59. Again borrowing from equity, there has been a decrease on the importance of oral testimony in open court and of the trial itself, with profound influence on the quality and meaning of dispute resolution, and on the nature of trial advocacy. *See* Carrington, *Ceremony and Realism: Demise of Appellate Procedure,* 66 A.B.A. J. 860 (July 1980); Stanley, *President's Page,* 62 A.B.A. J. 1375, 1375 (1976); *infra* text accompanying notes 445-48.

[82] *See infra* text accompanying notes 110-21, 214-15, 381-82.

ther a combined common law and equity system or the nineteenth century procedural code system.[83] The norms and attitudes borrowed from equity define our current legal landscape: expansion of legal theories, law suits, and, consequently, litigation departments; enormous litigation costs; enlarged judicial discretion; and decreased jury power.

Before discussing how the shift to an equity-type jurisprudence came about, it is important to issue four warnings. First, I am not arguing that before the Federal Rules there had been no movement toward equity. To the contrary, the Field Code of 1848 took some steps in that direction, and there were subsequent experiments in liberalized pleading, joinder and discovery.[84] What I *am* saying is that the Federal Rules were revolutionary in their approach and impact because they borrowed so much from equity and rejected so many of the restraining and narrowing features of historic common law procedure. It was the synergistic effect of consistently and repeatedly choosing the most wide-open solutions that was so critical for the evolution to what exists today.

Second, I am not saying that the Federal Rules are solely responsible for shaping the contours of modern civil litigation. Factors such as citizen awareness of rights, size and scope of government, and individual and societal expectations for the good and protected life should also be considered.[85] Causes and effects here, as with other historical questions, are virtually impossible to disentangle. So far as I can determine, the Federal Rules and the Enabling Act are simultaneously an effect, cause, reflection, and symbol of our legal system, which is in turn an effect, cause, reflection, and symbol of the country's social-economic-political structure. It cannot be denied, however, that the Federal Rules facilitated other factors that pushed in the same expansive, unbounded direction.[86]

Third, to criticize a system in which equity procedure has swallowed the law is not to criticize historic equity or those attributes of modern practice that utilize equity procedure. This is not an attack on

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[83] *See* Schaefer, *Is the Adversary System Working in Optimal Fashion?*, in THE POUND CONFERENCE, *supra* note 6, at 171, 186 ("The 1906 lawyer would not recognize civil procedure as it exists today, with relaxed pleading standards, liberal joinder of parties and causes of action, alternative pleadings, discovery, and summary and declaratory judgments.").

[84] *See* G. RAGLAND, JR., DISCOVERY BEFORE TRIAL 17-18 (1932); *infra* text accompanying notes 132-38.

[85] One should also consider the growth in legislation and regulation, transactions and their complexity, photocopying and data processing, nontangible property, and the size of law firms. *See supra* text accompanying note 18.

[86] *See infra* notes 355-58 and accompanying text (describing the impact of the New Deal on the development of the Federal Rules).

those aspects of *Brown v. Board of Education*[87] or other structural cases that attempt to re-interpret constitutional rights in light of experience and evolving norms of what is humanitarian. I *do* criticize, however, the availability of equity practice for all cases, the failure to integrate substance and process, and the failure to define, categorize, and make rules after new rights are created. In other words, I question the view of equity as the dominant or sole mode instead of as a companion to a more defined system.

Fourth, I am not suggesting that we should return to common law pleading or to the Field Code. Nonetheless, there are aspects of common law thought, pre-Federal Rules procedure, and legal formalism that may continue to make sense and should inform our debate about appropriate American civil procedure.[88]

II. The Common Law Mentality in Pre-Twentieth Century America

One way of gaining perspective on current civil procedure is to examine the previous American experience. By the end of the nineteenth century, some lawyers, particularly in New York, were proposing simplified, flexible rules that would permit judges to escape procedural restraints in order to do substantive justice.[89] The tensions associated with a federal system also collided with the common law integration of substance and process. Until the twentieth century, however, the predominant mode of procedural thought, reinvigorated by Field and his Code, was still common law based.

A. *The Early Distrust of Equity, Evolution to Common Law Procedure, and Passionate Belief in the Jury*

The dual law-equity procedural system and the complexities of common law procedure did not arrive with the Mayflower. Particularly in the north, many colonists distrusted separate equity courts. Equity represented uncontrolled discretion and needless delay and expense.[90]

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[87] 347 U.S. 483 (1954).

[88] *See generally* Subrin, *The New Era in American Civil Procedure*, 67 A.B.A. J. 1648 (1981) (evaluating the proposed 1981 amendments to the Federal Rules and suggesting that the amendments are part of a movement in civil procedure generally that recognizes the interdependence of substance and procedure); *see infra* text accompanying notes 472-515.

[89] *See infra* notes 181-91 and accompanying text.

[90] *See* L. Friedman, *supra* note 54, at 47-48; Beale, *Equity in America*, 1 Cambridge L.J. 21, 21-23 (1921); Curran, *The Struggle for Equity Jurisdiction in Massachusetts*, 31 B.U.L. Rev. 269, 272 (1951); Katz, *The Politics of Law in Colonial*

The earliest colonial courts had jurisdiction over types of disputes that in England would have fallen to several different courts, including common law, equity, manor, and county.[91] Great confidence was reposed in jurors, who were permitted to decide questions that in England were reserved for Chancellors or common law judges.[92]

The writ system never developed the degree of sophistication in America that it achieved in England.[93] There were apparently considerably fewer writs used than the thirty or forty common in thirteenth century England.[94] From about 1680 through 1820, however, there was gradual movement from the relatively unstructured, nontechnical procedural solutions of the early colonists to a greater reliance on common law forms and procedures.[95] The pleadings normally did not go beyond a few simple steps, but on occasion the lawyers engaged in "special pleading."[96] English common law rules restricting joinder, insisting on a single form of action, and requiring great precision and detail were often taken seriously.[97]

America: Controversies Over Chancery Courts and Equity Law in the Eighteenth Century, in 5 PERSPECTIVES IN AMERICAN HISTORY 257-84 (B. Bailyn & D. Fleming eds. 1971); Smith & Hershkowitz, *Courts of Equity in the Province of New York: The Cosby Controversy, 1732-1736,* 16 AM. J. LEGAL HIST. 1 (1972) (describing the controversy that occurred when William Cosby, royal governor of New York from 1732 to 1735, attempted to establish courts of equity in the province of New York); Wolford, *The Laws and Liberties of 1648,* 28 B.U.L. REV. 426 (1948), *reprinted in* D. FLAHERTY, ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW 162, 163 (1969) [hereinafter ESSAYS, EARLY AMERICAN LAW]; Woodruff, *Chancery in Massachusetts,* 9 B.U.L. REV. 168, 182-83 (1929).

[91] *See* Goebel, *The Courts and the Law in Colonial New York,* in 3 HISTORY OF THE STATE OF NEW YORK 3 (C. Flick ed. 1933), *reprinted in* ESSAYS, EARLY AMERICAN LAW, *supra* note 90, at 245, 255-56; Morris, *Massachusetts and the Common Law: The Declaration of 1646,* 31 AM. HIST. REV. 443 (1925-1926), *reprinted in* ESSAYS, EARLY AMERICAN LAW, *supra* note 90, at 135, 143; Smith, Administrative Control of the Courts of the American Plantations, *reprinted in* ESSAYS, EARLY AMERICAN LAW, *supra* note 90, at 281, 285; Wolford, *supra* note 90, at 184-85.

[92] *See infra* notes 102-06.

[93] The needs of new settlers on the edge of the wilderness; the dearth of trained, experienced attorneys, clerks, and administrators; the absence of a formal court structure, with well-defined bureaucratic functions; and the colonists' own previous experience primarily with local courts in their county or manor, rather than with the Central courts, all helped lead to the initial reception of some English law, but often it was law of a local, customary nature. *See* W. NELSON, AMERICANIZATION OF THE COMMON LAW 21-23 (1975).

[94] Evidently, the number had been reduced to 10 in New York. *See* THE FIRST REPORT OF THE (NEW YORK) COMMISSIONERS ON PRACTICE AND PLEADING 139 (1848) [hereinafter 1848 REPORT]. For a description of the writ system in England in the 13th century, see 2 F. POLLACK & F. MAITLAND, *supra* note 37, at 564-67.

[95] *See* W. NELSON, *supra* note 93, at 2-9.

[96] *See* 1 THE ADAMS PAPERS—LEGAL PAPERS OF JOHN ADAMS 28 (L. Wroth & H. Zobel eds. 1968) [hereinafter ADAMS PAPERS]; W. NELSON, *supra* note 93, at 23.

[97] *See* ADAMS PAPERS, *supra* note 96, at 29; W. NELSON, *supra* note 93, at 72-77.

The Revolution, and victory over the English, did not result in less attraction to English legal procedure, and perhaps even increased the trend toward procedural anglicization for a decade or two. Americans had argued that they were fighting for the rights of Englishmen embodied in the common law.[98] Soon after it convened in 1774, the Continental Congress resolved "that the respective colonies are entitled to the common law of England . . . ."[99] After 1776, several states passed reception statutes that adopted the "common law."[100] Although exactly what had been received is not clear, English common law procedures continued in force. Many states established separate equity courts, or specifically permitted their common law judges to hear equity cases or to apply equitable principles and grant equitable remedies.[101]

During the colonial period and the early years of the republic, the often passionate belief in the lay jury continued. Although in England several devices had already been developed to control juries, few were used in Massachusetts, where juries determined both law and facts.[102] Upon attaining statehood, each of the thirteen original colonies, as well as the federal government, provided citizens with the right to a jury trial in both criminal and civil cases.[103] The first Chief Justice of the United States Supreme Court, with the approval of the entire bench, instructed a jury that although judges are presumed to be "the best judges of law," questions of both law and fact "are lawfully within your power of decision."[104] The historian William Nelson reminds us that to the colonist "the jury was viewed as a means of controlling judges' discretion and restraining their possible arbitrary tendencies."[105] He also suggests that the jury was a vital means for officials to obtain support for the law.[106]

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[98] *See* L. FRIEDMAN, *supra* note 54, at 95-96.

[99] Chaffee, *Colonial Courts and the Common Law,* 68 *Proceedings of the Massachusetts Historical Society* 132 (1952), in ESSAYS, EARLY AMERICAN LAW, *supra* note 90, at 59, 60 (citing, inter alia, 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 69 (1904)); *see also* L. FRIEDMAN, *supra* note 54, at 95-97 (discussing American adoption of English common law after the American Revolution).

[100] *See* L. FRIEDMAN, *supra* note 54, at 95-97.

[101] *See id.* at 130-31.

[102] See W. NELSON, *supra* note 93, at 21; *see also* ADAMS PAPERS, *supra* note 96, at xlix (noting that judges exerted little control over a jury once the case had been sent to the jury room).

[103] *See* F. JAMES & G. HAZARD (2d), *supra* note 50, at 347-48.

[104] Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 4 (1794) (Jay, C.J.).

[105] W. NELSON, *supra* note 93, at 20-21.

[106] *See id.* at 34-35; *see also* T. JEFFERSON, AUTOBIOGRAPHY (1821), *reprinted in* 1 THE WORKS OF THOMAS JEFFERSON 3, 78 (Ford ed. 1904) [hereinafter JEFFERSON WORKS] (Thomas Jefferson argued that the jury should be introduced "into the Chancery courts, which have already ingulfed and continue to ingulf, so great a proportion of the jurisdiction over our property."); A. DE TOCQUEVILLE, DEMOCRACY IN

By the beginning of the nineteenth century, American judges had begun to restrict the role of the jury. They questioned the jury's right to decide issues of law, tightened rules of evidence in order to control what juries heard, treated what had been fact issues as law issues, and regularly set aside jury verdicts as contrary to the law.[107] Also, the extension of equity and admiralty jurisdiction placed whole classes of cases beyond the reach of juries.[108] These developments transformed what had been questions for the community into questions for lawyers and judges. Over time, many lawyers viewed the jury merely as a mode of dispute resolution, and not as an integral part of democratic government.

B. *The Disengagement of Procedure and Substance*

Several factors in the American experience began to disengage matters of substance, procedure, and remedy that the common law had attempted to integrate. Gradually, treatises and law schools replaced apprenticing as the preferred method of learning to practice law.[109] This disembodied the study of law from practical considerations that are more obvious when one learns by doing. Sir William Blackstone also published his immensely influential four volumes of *Commentaries*[110] from 1765 to 1769.[111] Blackstone atomized the study of law by separating not only rights from wrongs, but also the methods of en-

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AMERICA 303-07 (H. Reeve trans. 1904) (discussing the importance of the jury system); Adams' Diary Notes on the Right of Juries (Feb. 12, 1771), *reprinted in* ADAMS PAPERS, *supra* note 96, at 228-29 (noting that the people have an important share in the administration of justice); Letter from Thomas Jefferson to L'Abbé Arnond (July 19, 1789), *reprinted in* 5 JEFFERSON WORKS, *supra,* at 483-84 (asserting that the jury is the only way to ensure the honest administration of government).

[107] *See* L. FRIEDMAN, *supra* note 54, at 134-35 (discussing the tightening of the rules of evidence); M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860, at 28-29, 141-43 (1977) (discussing procedural changes used to restrict the scope of juries); W. NELSON, *supra* note 93, at 168-72 (discussing the transfer of the law-finding function from the jury to the judge); Note, *The Changing Role of the Jury in the Nineteenth Century,* 74 YALE L.J. 170, 192 (1964) (noting 19th century criticism of a jury's right to decide questions of law). The evidence point is perhaps most clearly expressed in J. WIGMORE, A STUDENT'S TEXTBOOK OF THE LAW OF EVIDENCE 4-5 (1935).

[108] *See* L. FRIEDMAN, *supra* note 54, at 229-31 (discussing the development of admiralty jurisdiction); P. MILLER, THE LIFE OF THE MIND IN AMERICA 179 (1965) (discussing the debate over the development of specific areas of law, such as patent law, which were thought to be too technical to try to a jury).

[109] *See* L. FRIEDMAN, *supra* note 54, at 278-80, 525-38.

[110] 1-4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765-1769).

[111] *See* L. FRIEDMAN, *supra* note 54, at 88-89; Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact,* 51 N.Y.U. L. REV. 731, 735 (1976).

forcement from both. He treated English law as a rational, objective science, congruent with natural law. Blackstone, thus, disassociated the learning of rights, wrongs, and methods of enforcement from the social-economic-political environment.[112]

Federalism also tended to divert attention from the integration of rights and the methods for vindicating those rights. The establishment of separate federal courts presented the problem of what law to apply. It was unclear whether the Rules of Decision section of the Judiciary Act of 1789 covered procedural law, but the Process Act of the same year supplied the same basic formula: apply state law in federal court, unless a federal law provides otherwise.[113] Subsequent process and conformity acts repeated the pattern.[114] This would have permitted state substantive law and state procedure to be applied simultaneously in federal court, but federal court excursions into substantive law separated substantive and procedural lawmaking.[115] In 1875, the federal trial courts were granted jurisdiction to hear suits arising under federal law.[116] As federal law became more dominant, federal judges increasingly applied federal law and state procedure.[117] Conversely, both as a result of federal procedural statutes and because of federal judiciary policies, especially with respect to judge-jury relations, the federal judges often rejected state procedure, even when applying state laws.[118] Neither federal legislators nor federal judges concentrated on how to match the process to the substance. The result was further movement away from the integration of substance and process.

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[112] *See* Kennedy, *The Structure of Blackstone's Commentaries,* 28 BUFFALO L. REV. 205, 222, 227-34 (1979); *see also* T. PLUCKNETT, *supra* note 24, at 277-78 (discussing the 15th century legal scholar, Littleton, who wrote a treatise on property law in which "substantive law [is never] obscured by procedure").

[113] *See* Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93 (Process Act) ("[Unless federal law requires otherwise], the forms of writs and executions . . . shall be the same in each state respectively as are now used . . . in the supreme courts of the same."); Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 92 (codified as amended at 28 U.S.C. § 1652 (1982)) (Rules of Decision Act) ("[T]he laws of the several states [unless they conflict with federal law] shall be regarded as the rules of decision in trials at common law . . . .").

[114] *See* 1 J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 509-51 (1971) (discussing the process acts of the 1780's and 1790's); H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 17-18, 581-86 (1963) (discussing the repeated pattern of state law governing unless superseded by federal law in the process and conformity acts of the 1700's and 1800's).

[115] *See, e.g.,* Swift v. Tyson, 41 U.S. (16 Pet.) 1, 17-18 (1842) (applying federal common law).

[116] *See* Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470 (codified at 28 U.S.C. § 1331 (1982)); H. HART & H. WECHSLER, *supra* note 114, at 229-32.

[117] *See* Clark & Moore I, *supra* note 69, at 401-11.

[118] *See id.*

The federal scheme also presented the difficult problem of how best to include equity jurisdiction in the federal courts. The problem was solved, however, through further unbundling of the common law integration of rights, remedies, and procedures. In 1789, equity either did not exist or was underdeveloped.[119] Therefore, in some states, there would be little or no distinct equity law to which to conform. The solution in a succession of process and conformity acts was to have federal courts apply historic equity law, and not state law, in equity cases.[120] This meant, however, that law and equity in the federal courts were no longer companion systems, as they had originally developed. Because the federal courts were applying state substantive and procedural law in common law cases (except when the federal judges refused to follow a state procedure or when a federal procedural law took precedence), the federal courts had less occasion to view equity's role as filling in the gaps in the common law. A federal court was usually applying the law of a different sovereign—the state—and not creating its own unified legal system. This tension blurred the goal of carefully articulated rights, with occasional equitable incursions to alleviate harshness or to create an occasional new principle.

Similar tensions flow from the separation of powers between the judicial and legislative branches. In England, procedural and substantive common law had evolved together. Law was primarily judge-made.[121] The nineteenth century found legislators in both England and American playing an increasing role in law making, including the passage of laws regulating court procedures. While courts continued to build a common law, however, legislators passed codes of procedure, which again resulted in the disassociation of substance and process.

C. *Codification and the Field Code: Maintaining the Common Law Mentality*

Notwithstanding the pressures inherent in our governmental system to disengage process and substance, many features of the common

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[119] *See* H. HART & H. WECHSLER, *supra* note 114, at 578; *see also* Beale, *supra* note 90 (suggesting that there was greater antipathy against courts of equity in the North than the South at the time of the Revolution).

[120] *See* H. HART & H. WECHSLER, *supra* note 114, at 578-79. At first the federal courts were to apply civil law to forms and modes of proceeding in equity cases. *See* Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 94. Later, the forms of process in equity were to be "according to the principles, rules and usages which belong to courts of equity . . ., as contradistinguished from courts of common law," and subject to Supreme Court rulemaking power. *See* Act of May 8, 1782, ch. 36, § 2, 1 Stat. 275, 276.

[121] There was, however, some early legislation in England. *See* T. PLUCKNETT, *supra* note 24, at 318-28.

law mentality not only endured, but even were strengthened during the nineteenth century. It is important to look closely at the impact of codification on civil procedure. Although the Field Code of 1848 merged law and equity in addition to providing more general rules than the common law, it was not, contrary to its usual portrayal, a parent to the Federal Rules.[122]

Both opponents and proponents of codification leaned heavily upon the common law tradition. For Joseph Story, who wrote his *Commentaries on Equity Pleading* in 1834 and *Commentaries on Equity Jurisprudence* in 1836, equity was a system "auxiliary" to law and its "peculiar province" was correcting defects in the stricter common law.[123] Story was concerned about "the arbitrary power" and "despotic and sovereign authority" inherent in an unrestrained equity court.[124] The limitations on equity were to be reliance on precedents and conformity to procedure. Common law and equity courts, in Story's view, were best kept separate.[125] Equity without law would be too discretionary. Law without equity would be too stagnant. For Story, the merger of law and equity—soon to be accomplished in the Field Code—would endanger the confining quality of law and the creative force of equity.[126]

The merger of law and equity does have the capacity to upset the law-equity balance in favor of equity; if one set of rules must work for all cases, this, as we will see, may lead to more flexible, equity-like procedures. But a closer look at the merger under the 1848 Field Code shows more concern for the confining aspects of common law procedure than is generally recognized.[127] It was not that David Dudley Field and the other New York commissioners on Practice and Pleadings completely embraced common law procedure or totally rejected equity. They complained that the common law, and methods designed to circumvent that law, had resulted in a system that obscured facts and legal

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[122] For portrayals of the Federal Rules as a logical extension of the Field Code and nineteenth century procedural thought, see F. JAMES, JR., CIVIL PROCEDURE § 2.5, at 65-66, § 2.11, at 85-86 (1st ed. 1965); C. WRIGHT, *supra* note 1, at 436; Burger, *Rx for Justice: Modernize the Courts,* NATION'S BUSINESS, Sept. 1974, at 60, 61; Clark, *Code Pleading and Practice Today* [hereinafter Clark, *Code Pleading*], in DAVID DUDLEY FIELD: CENTENARY ESSAYS CELEBRATING ONE HUNDRED YEARS OF LEGAL REFORM 55, 65 (A. Reppy ed. 1949) [hereinafter CENTENARY ESSAYS]; Clark & Moore I, *supra* note 69, at 393; Holtzoff, *supra* note 69, at 1060-62; Pound, *David Dudley Field: An Appraisal,* in CENTENARY ESSAYS, *supra,* at 3, 14 [hereinafter Pound, *Field*].

[123] *See* G. MCDOWELL, *supra* note 9, at 76-79.

[124] *See id.* at 76.

[125] *See id.* at 77.

[126] *See id.* at 76-81.

[127] *See supra* note 122.

issues, rather than distilling and clarifying them.[128] The separate courts for law and equity seemed unproductive, illogical, and wasteful to them; lawyers often did not know which court to enter, and frequently an entire controversy could not be decided in one suit.[129] Within the legal reform tradition of Bentham, Field and the other commissioners attempted to weed out what to their thinking was needless technicality that prevented the simple and inexpensive application of law.[130] They were returning to an earlier period in English equity practice, before equity pleading itself became extraordinarily complicated.[131]

Field and the other commissioners wrote that they used equity as a model.[132] Arphaxed Loomis, one of the original commissioners, described how he was forced to reject common law principles and turn to equity in order to draft a procedural code for a merged system of law and equity:

> I prepared and submitted . . . about 60 sections of law, based on the Common Law System, abolishing forms of action and general issues and requiring all pleadings to be sworn to, as to belief. I found serious difficulty in applying it to Chancery cases and in framing fixed Common Law issues under it. I then abandoned it and drew up some 70 or 80 sections based on Chancery principles, abolishing forms of actions, applying it to all kinds of actions . . . . The system approaches and assimilates more nearly with the equity forms than with those of the common law.[133]

There are striking similarities between equity practice and the procedural choices made by the Field Code. The Code eliminated the forms of action and, for the most part, provided the same procedure for

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[128] *See, e.g.*, D.D. FIELD, *What Shall Be Done with the Practice of the Courts?* (Jan. 1, 1847), *reprinted in* 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 226, 235-37 (A. Sprague ed. 1884) [hereinafter FIELD SPEECHES].

[129] *See* 1848 REPORT, *supra* note 94, at 73-75.

[130] For the commissioners' admiration of Jeremy Bentham's work, see COMMISSIONERS ON PRACTICE AND PLEADINGS, THE CODE OF CIVIL PROCEDURE OF THE STATE OF NEW YORK, REPORTED COMPLETE 694, 695 (1850).

[131] *See* 9 W. HOLDSWORTH, *supra* note 58, at 390-404 (discussing the increasing complication of equity practice in the 17th and 18th centuries); Bowen, *supra* note 39, at 524-27 (noting the delays, expense, and complication of equity practice in the Victorian period).

[132] *See* 1 FIELD SPEECHES, *supra* note 128, at 258; STATE OF NEW YORK, SECOND REPORT OF THE COMMISSIONERS OF PRACTICE AND PLEADINGS, CODE OF PROCEDURE (1849), *reprinted in* 1 FIELD SPEECHES, *supra* note 128, at 281.

[133] A. LOOMIS, HISTORIC SKETCH OF THE NEW YORK SYSTEM OF LAW REFORM IN PRACTICE AND PLEADINGS 16, 25 (1879).

all types of cases, regardless of substantive law, the number of issues and parties, or the stakes.[134] It discarded the stylized search for a single issue, and mandated that parties should simply plead "in ordinary and concise language without repetition."[135] The Code liberalized a party's ability to amend pleadings and to enter evidence at variance with a pleading.[136] It expanded the number of potential parties, causes of action, and defenses that could be joined in one suit.[137] It provided discovery mechanisms and permitted the court to grant the plaintiff "any relief consistent with the case made by the complaint, and embraced within the issue."[138]

There are, however, critical differences between equity and the Field Code. Discretion and flexibility were at the heart of historic equity practice.[139] But judicial discretion and legal flexibility were anathema to Field and his Commission. They believed that "to say that law is expansive, elastic, or accommodating, is as much to say that it is no law at all . . . ."[140] Individual rights, state rights, limited government, and laissez faire economics were at the heart of Field's creed.[141] The

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[134] *See* 1848 CODE, *supra* note 79, § 62.

[135] *Id.* §§ 120(2), 128(2), 131. The pleadings were then only a complaint, demurrer, answer, and reply. *See id.* § 132. An answer could join multiple defenses, *see id.* § 129. The "ordinary and concise language, without repetition" provisions are found in *id.* §§ 120(2), 128(2), & 131.

[136] *See id.* §§ 145-152; *see also* 1848 REPORT, *supra* note 94, notes accompanying §§ 145-152, at 158-60.

[137] For joinder of parties, see 1848 CODE, *supra* note 79, §§ 97-98; for joinder of causes of action, see *id.* § 143; for joinder of defenses, see *id.* § 129; on multiple issues, see also *id.* § 206 (On issues of law and fact, issues of law must be tried first.).

[138] 1848 REPORT, *supra* note 94, § 231, at 195-96 and accompanying comments.

[139] *See* Pound, *The Decadence of Equity,* 5 COLUM. L. REV. 20, 26 (1905) [hereinafter Pound, *Decadence of Equity*] (discussing the impairment of discretion as equity developed into a system and gradually merged with law); *supra* notes 58-61 and accompanying text (discussing historic equity practice).

[140] D.D. FIELD, *Introduction to the Completed Civil Code* (1865), *reprinted in* 1 FIELD SPEECHES, *supra* note 128, at 323, 330-31; *see also* D.D. FIELD, *Codification of the Law, reprinted in* 1 FIELD SPEECHES, *supra* note 128, at 349, 354 (Correspondence between the California Bar and Field, Nov. 28, 1870); Field, *Mr. Field on the Codes,* 7 ALB. L.J. 193, 196 (1873) ("inflexibility is certainty, which . . . is, to my thinking, a merit of the highest value"). *But cf.* A. LOOMIS, *supra* note 133, at 25 (stating that the Commissioners on Practice and Pleading employed "little detail, allowing to the Courts freedom of construction and application, as the administration of justice might require.").

[141] *Cf.* Field, *Theory of American Government,* 146 N. AM. REV. 542 (1888); D.D. FIELD, *Municipal Officers, reprinted in* 2 FIELD SPEECHES, *supra* note 128, at 176, 183 (Address to the Young Men's Democratic Club of New York, Mar. 13, 1879); D.D. Field, Personal Recollections, at 45, Field-Musgrave mss., Manuscript Department, William R. Perkins Library, Duke University [hereinafter Field-Musgrave mss.] (indicating that the Field family tradition contains the following inherited guideposts: "the love of freedom, the spirit of independence; fidelity in every position, private or public; and the traditions of truth, justice and honor"); D.D. Field, Recollections of My Early Life Written in the Spring of 1832, at 2, 4, in Field-Musgrave mss..

major goal of the Field Code was to facilitate the swift, economic, and predictable enforcement of discrete, carefully articulated rights. The commissioners wrote about faithfully applying the rules of law to the facts of each particular case. For Field, the evils were disorder, confusion, and caprice. Judges must obey and apply known rules:

> The science of the law is our great security against the maladministration of justice. If the decision of litigated questions were to depend upon the will of the Judge or upon his notions of what was just, our property and our lives would be at the mercy of a fluctuating judgement, or of caprice. The existence of a system of rules and conformity to them are the essential conditions of all free government, and of republican government above all others. The law is our only sovereign. We have enthroned it.[142]

"[F]acts constituting the cause of action" was the pleading requirement the commissioners chose.[143] Field, who loved science (particularly astronomy) and mathematics, was drawn to the word "facts." He believed that one should try to determine objective reality, just like a scientist.[144] The Code used the term "cause of action" to describe those groupings of facts that would call forth judicial intervention, whether in law or equity.[145] The term "cause of action" was at least as old as the fifteenth century.[146] Like the forms of action under the writ system, the term implied a set of circumstances for which there was a known remedy.

For Field, a carefully constructed procedure, with defined prescriptions and proscriptions, was needed to enforce the rights to be contained in the companion substantive code that he had envisioned.[147] As

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[142] D.D. FIELD, *Magnitude and Importance of Legal Science, reprinted in* 1 FIELD SPEECHES, *supra* note 128, at 517, 530 (Address at the opening of the Law School of the University of Chicago, Sept. 21, 1859).

[143] 1848 CODE, *supra* note 79, § 120(2).

[144] *See* H. FIELD, THE LIFE OF DAVID DUDLEY FIELD 29 (1898) (discussing Field's love of study and science); D. Van Ee, David Dudley Field and the Reconstruction of the Law 4, 8, 14 (1974) (Ph.D. Dissertation, The Johns Hopkins Univ., to be published as part of Garland Publishing's series of dissertations, entitled *American Legal and Constitutional History;* the citations are to the original, unpublished dissertation).

[145] *See* 1848 REPORT, *supra* note 94, at 141; C. HEPBURN, THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND 12-13 (1897) (suggesting that code pleading provides for a "single form of action" to protect both legal and equitable rights); 1 FIELD SPEECHES, *supra* note 128, at 240-41.

[146] *See* Clark, *The Code Cause of Action,* 33 YALE L.J. 817, 820 n.16 (1924) [hereinafter Clark, *Code Cause*] (citing, inter alia, 17 Edw. 4, f. 3, pl. 2 (1477)).

[147] *See* C. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM 194-96 (1981) (discussing Field's attempts to codify both

at common law, procedure had to intermesh with the rights, in order for the rights to be delivered. For Field, procedural simplicity meant neither the absence of definition and constraint, nor did it mean discretion and flexibility.

As in common law procedure, Field and the other commissioners wanted pleadings to reveal each side's position and to narrow the controversy, thus leading to "the real charge" and "the real defense" as expeditiously as possible.[148] The Field Code contained a strong verification requirement to encourage truthful pleading, prevent "to a considerable extent groundless suits and groundless defenses," and compel the admission of the "undisputed" facts.[149] Although somewhat broader than at common law, the Code joinder provisions remained confining and limiting. Plaintiffs could be joined only if they had "an interest in the subject of the action, and in obtaining the relief demanded," and defendants if they had "an interest in the controversy, adverse to the plaintiff."[150] Causes of action could be joined only if they belonged to one of a group of classes of cases, and if the "causes of action . . . must equally affect all the parties to the action."[151]

Field's major purpose was to reduce the amount of documentation.[152] A critical step in facilitating merger was to make equity trials like law trials, with testimony in open court.[153] The Field Code eliminated equitable bills of discovery and interrogatories as part of the equitable bill.[154] The Code included no interrogatory provisions. Motions

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procedural and substantive law). The substantive code, which was never adopted in New York, was completed in 1862. *See* COMMISSIONERS OF THE (NEW YORK) CODE, DRAFT OF A CIVIL CODE FOR THE STATE OF NEW YORK (1862) [hereinafter 1862 DRAFT CIVIL CODE FOR NEW YORK].

[148] *See* 1848 REPORT, *supra* note 94, at 153; 1 FIELD SPEECHES, *supra* note 128, at 240.

[149] 1 FIELD SPEECHES, *supra* note 128, at 239; *see also* FINAL REPORT OF THE (NEW YORK STATE) PRACTICE COMMISSION 302-03 (Dec. 31, 1849).

[150] 1848 CODE, *supra* note 79, §§ 97-98.

[151] *Id.* § 143; *see also id.* § 100 (providing a distinct rule of joinder for "[p]ersons severally liable upon the same obligation or instrument"). The categories were very strict and greatly resembled previous common law forms of action. *See* McCaskill, *Actions and Causes of Action,* 34 YALE L.J. 614, 624-26 (1925) [hereinafter McCaskill, *Actions*]. In 1852, a category was added that covered causes "arising out of the same transaction or transactions connected with the same subject of action," 1852 N.Y. Laws, ch. 392, § 167, but courts construed this category narrowly. *See* F. JAMES & G. HAZARD (2d), *supra* note 50, at 460-61.

[152] *See* 1848 REPORT, *supra* note 94, at 244 (commentary on § 350); 1 FIELD SPEECHES, *supra* note 128, at 227, 232, 260.

[153] As the commissioners explained in the 1848 REPORT, *supra* note 94, at 177, the new 1846 New York Constitution had already provided that "[t]he testimony in equity cases shall be taken in like manner as in cases at law." N.Y. CONST. art. 6, § 10.

[154] *See* 1848 CODE, *supra* note 79, § 343; 1848 REPORT, *supra* note 94, at 244

to produce documents and for requests for admission had severe limitations.[155] Oral depositions were permitted only of the opposing party, in lieu of calling the adverse party at trial, and subject to "the same rules of examination" as at trial.[156] A pretrial deposition of the adverse party was to be before a judge, who would rule on evidence objections.[157]

The Field Code was jury-empowering. Field feared the potential tyranny of the unrestrained judge. The heart of his belief in codification was that legislators, not judges, should enact laws.[158] Field wrote that "our experience has made us regard it as a first principle, that every common law judge, whether in the highest courts or the lowest, should sit at trials with juries; a principle which I would extend to equity judges also."[159] The commissioners spoke of the jury as one of "[o]ur most valued institutions" and seemed to mean it.[160] The Field Code extended the right to jury trial beyond state constitutional protection, and included some cases that had previously been nonjury equity cases.[161] It was up to the jury to decide whether it wanted to render a general or special verdict.[162] There was no directed verdict provision in the Code.[163]

Prior to the Field Code, complaints about the expense, delay, and unwieldiness of equity cases were legion.[164] Chancellor Kent had been

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(discussing the elimination of written interrogatories).

[155] *See* 1848 CODE, *supra* note 79, § 342.

[156] *Id.* §§ 344-345; *see also* 1848 REPORT, *supra* note 94, at 245 (comment explaining "[b]ut if the examination of the witness be once had, we would not permit it to be repeated, else it might become the means of annoyance").

[157] *See* 1848 CODE, *supra* note 79, §§ 344-345; *see also* comment in 1848 REPORT, *supra* note 94, at 245.

[158] *See supra* notes 139-42 and accompanying text.

[159] D.D. FIELD, RE-ORGANIZATION OF THE JUDICIARY, FIVE ARTICLES ORIGINALLY PUBLISHED IN THE EVENING POST ON THAT SUBJECT 3, 4 (1846) [hereinafter FIELD, RE-ORGANIZATION].

[160] 1848 REPORT, *supra* note 94, at 139. The commissioners also explained how juries had demonstrated already that they could handle cases with multiple parties and multiple issues, and that "[t]he rapid examination which takes place on common law trials before juries, leads to the truth, as surely as the slower process of other trials." *Id.* at 178.

[161] *See, e.g.*, N.Y. CONST. art. 1, § 2, *quoted in* 1848 REPORT, *supra* note 94, comment to § 208. The new provision is 1848 CODE, *supra* note 79, § 208.

[162] *See* 1848 CODE, *supra* note 79, §§ 215, 216. The test in § 216 for when the jury could decide the type of verdict it wished to enter was the same as the new test for entitlement to jury trial. *See id.* § 208.

[163] *See id.* In 1852, the New York Code was amended to add what one scholar believes was, "in a circumscribed measure," a precursor to a judgment n.o.v. provision. *See* MILLAR, THE OLD REGIME AND THE NEW IN CIVIL PROCEDURE 41, 42 (N.Y.U. School of Law Contemporary Law Pamphlets, Series 1, Number 1, 1937) (citing § 265 of 1851 Code (§ 220 of 1848 Code) as amended in 1852). For a history of the directed verdict in New York, see Smith, *The Power of the Judge to Direct a Verdict: Section 457-a of The New York Civil Practice Act,* 24 COLUM. L. REV. 111 (1924).

[164] *See* 2 C. LINCOLN, CONSTITUTIONAL HISTORY OF NEW YORK 69-70 (1906);

widely criticized for his extreme adherence to English principles and his well-known dislike and suspicion of democratic institutions.[165] Reuben Wadsworth, the "last Chancellor of the state," was famous for his slowness. Indeed, the repeated tardiness of his decisions had been a leading factor in the abolition of the Court of Chancery.[166] In 1846, Field wrote about the "magnitude of . . . [Chancery's] abuses."[167]

In 1847, Field explained in detail how he would make equity more like common law in order to make merger possible. He first noted that the new constitution directed that "testimony . . . be taken in like manner in both classes of cases; [and] abolishes the offices of Master and Examiner in Chancery, hitherto important parts of our equity system . . . . Important modifications of the equity practice are thus indispensible, in order to adapt it to the new mode of taking testimony.[168] He then took aim directly at several equity practices. Field advocated, inter alia, shortening the equitable bill; eliminating delays between pleadings and between Masters' reports and Chancellors' decisions; removing discovery from the pleadings; eliminating written interrogatories; verifying all pleadings; and whenever possible, presenting testimony orally in open court and not by filing documents, as was customary in equity.[169]

M. Hobor, The Form of the Law: David Dudley Field and the Codification Movement in New York 1839-1888, at 50-55 (1975) (unpublished Ph.D. Dissertation, Univ. of Chicago). For earlier colonial disfavor of equity, see *supra* note 90 and accompanying text.

[165] For an in-depth study of Chancellor Kent's high-handed character, see J. HORTON, JAMES KENT: A STUDY IN CONSERVATISM, 1763-1847 (1939 & photo. reprint 1969).

[166] *See* M. Hobor, *supra* note 164, at 205.

[167] FIELD, RE-ORGANIZATION, *supra* note 159, at 8; *see also* 1848 REPORT, *supra* note 94, at 71 (stating also positive things about equity, such as that equity "was nevertheless, in its own nature, flexible, highly convenient, and capable of being made to answer all the ends of justice. There was literally no form about it.").

[168] 1 FIELD SPEECHES, *supra* note 128, at 226-27.

[169] *See id.* at 227-33; *see also* F. JAMES, JR., *supra* note 122, at 11 (although according to Field not all equity pleadings in New York had to be verified, equity did traditionally require sworn pleadings).

Even with respect to equitable relief, Field criticized injunctions and the commissioners attempted to specify precisely what remedies should apply to most types of cases. In a bitterly contested case in 1857, for instance, Field complained to the judge that there were "far too many injunctions for a free people," and that "[t]he time would come . . . [when such injunctions] would not be allowed to issue at all." D. Van Ee, *supra* note 144, at 137 (citing the *New York Herald,* July 23, 1857). But injunctions were an important part of Field's practice. *See* G. MARTIN, CAUSES AND CONFLICTS: THE CENTENNIAL HISTORY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 1870-1970, at 5 (1970). This was evidenced by a newspaper report on Field's death which stated that "[h]e was reproved by the lawyers for his developments of the possibilities and capabilities of the writ of injunction to a degree never before practised." *David Dudley Field Dead,* The World, April 14, 1894, at 2, col. 3. For specific remedies, see 1862 DRAFT CIVIL CODE FOR NEW YORK, *supra* note 147,

The Field Code was adopted in about half the states, covering the majority of the country's population.[170] Those closer to David Dudley Field in time often stressed the restrictive, confining, formalistic nature of his Codes.[171] There was little question that Field was as deeply wedded to common law procedural thought as he was to equity. Charles M. Hepburn, in his 1897 work, *The Historical Development of Code Pleading,* emphasized that "certainty" was the chief end of the Field Code.[172] The purpose of Code procedure was to maintain and redress "the primary legal rights subsisting between man and man in general."[173] During the 1920's, Professor O.L. McCaskill demonstrated that the Field Code was closely tied to the common law form of action.[174] In his 1928 treatise on code pleading, Charles Clark insisted that the Code was rigid and inflexible compared with equity practice.[175]

In sum, the New York Constitution, Field, the commissioners, and the Field Code, in combination, leaned as much, or more, toward the view of common law procedure, as to equity.

D. *Nineteenth Century Rivulets Toward the Sea of Procedural Simplicity*

1. Looking Backwards: Constricting the Code

The nineteenth century reactions and counterreactions to the Field Code assisted in divorcing modern procedure from the common law

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§§ 1504-1506. For the position that the Code commissioners were insufficiently precise with respect to damages (and also unfaithful to then current law), see A. SEDGWICK, DAMAGES IN THE CODE: AN EXAMINATION OF THE PROPOSED CIVIL CODE RELATING TO THE MEASURE OF DAMAGES, OR COMPENSATORY RELIEF (1895) (printed by direction of the Committee on the Code of the New York Bar Association).

[170] *See* H. FIELD, *supra* note 144, at 356 (estimating that 38 million out of 63 million people in 1890 lived in states that had adopted the Code); C. HEPBURN, *supra* note 145, at 14-15 (listing the 27 states that had adopted the Field Code by 1897 and additional states in which the pleading closely resembled the Code).

[171] *See, e.g.,* REPORT OF THE JOINT LEGISLATIVE COMMITTEE ON THE SIMPLIFICATION OF CIVIL PRACTICE 11 (New York 1919) [hereinafter JOINT LEGISLATIVE COMMITTEE] (discussing the bar's dissatisfaction with the Code); Pound, *Some Principles of Procedural Reform,* 4 ILL. L. REV. 388, 403 (1910) [hereinafter Pound, *Some Principles*] (noting the judiciary's hostility to the Code).

[172] C. HEPBURN, *supra* note 145, at 8.

[173] *Id.* at 19. Roscoe Pound criticized this approach in 1910 because he felt that code reformers "had their eyes chiefly on practice at law and in consequence made rules at many points which proved awkward of application to equity proceedings." Pound, *Some Principles, supra* note 171, at 403.

[174] *See* McCaskill, *Actions, supra* note 151, at 624-25.

[175] *See* C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 34 (1928) [hereinafter C. CLARK, 1928 HANDBOOK].

mentality. The legal profession had been and continued to be schooled in common law forms of action.[176] Needing some structure for their analysis of cases, many lawyers, not surprisingly, operated under the new codes while still trying to fit their allegations into forms they knew. Some judges ignored merger and treated law and equity as separate.[177] Others interpreted the complaint in terms of forms of action, insisted that pleadings comply with common law technicalities, and required that the complaint clearly state a single theory of recovery, binding on the pleader at trial.[178] Judges also confined the applicability of the joinder and discovery provisions.[179] Rebellion against the restrictive handling of procedural codes by some courts influenced the drafting methods and procedural choices of later Federal Rule reformers.[180]

2. The Much Maligned Throop Code

Although not adopting the commissioners' proposed full length procedural code, the New York state legislature adopted amendments (mostly in 1876 and 1880) bringing the New York Code of Civil Procedure from its initial 392 provisions to 3441 provisions by 1897.[181] This Code, called the Throop Code, was in effect as amended until 1921.[182] It was attacked by bar committees for intermingling substantive and procedural provisions, and for being too long, too complicated, "too minute and technical, and lack[ing] elasticity and adaptability."[183]

Four proposed changes came out of the attack on the Throop Code, all of which carried over into twentieth century procedural reform. The changes leaned heavily toward equity procedure and thought. First, to counter the Throopian density and technicality, the new rules were to be fewer and more permissive in terms of joinder.[184]

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[176] *See id.* at 23-31, for a description of pleading in the several states before the Federal Rules. According to Clark, not all states became "pure" code states despite the Field Code's popularity.

[177] *See* C. CLARK, 1928 HANDBOOK, *supra* note 175, at 47-51.

[178] *See id.* at 44-51, 49 nn.31-35 & 50 n.36; A. LOOMIS, *supra* note 133, at 25-27; James, *The Objective and Function of the Complaint—Common Law—Codes—Federal Rules,* 14 VAND. L. REV. 899, 910-11 (1961).

[179] *See* C. CLARK, 1928 HANDBOOK, *supra* note 175, at 265-66, 284-86, 297-306; F. JAMES & G. HAZARD (2d), *supra* note 50, at 175, 458-60.

[180] *See* C. CLARK, 1928 HANDBOOK, *supra* note 175, at 47-49; Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules,* 3 VAND. L. REV. 493 (1950).

[181] *See* Pound, *Field, supra* note 122, at 10.

[182] *See* JOINT LEGISLATIVE COMMITTEE, *supra* note 171, at 11, 12; Clark, *Code Pleading, supra* note 122, at 62.

[183] REPORT OF THE COMMITTEE ON CODE REVISION (1898), 22 N.Y. ST. B.A. REP. 170, 175 (1899) [hereinafter 1898 N.Y. ST. B.A. CODE REVISION].

[184] *See id.* at 189-90. Summary judgment is also mentioned as a possible reform.

The following goal stated by a bar committee in 1898 will sound familiar to modern proceduralists:

> The practice in civil cases should be made so simple and elastic that courts and judges may be able to pass upon the substantive rights of the parties in each case, with as little restraint as is consistent with an orderly administration of justice; or to adopt the language of Lord Coleridge, "The science of statement should not be deemed of more importance than the substance of rights."[185]

This quest for simplicity included a desire to escape the pleading complexities arising from judicial attempts to interpret what pleading "facts" under the Field Code meant. There was much dispute in the case law about whether a particular allegation was a "dry naked actual fact,"[186] evidence, an ultimate fact, or a conclusion of law. Such disputes led to increasing dissatisfaction with technicality and definition and procedure.[187]

The simplicity theme was buttressed by a second, companion complaint that the Throop Code put unrelated matters side by side—a "patent lack of arrangement and symmetry."[188] The 1898 New York Bar Association committee on code revision proposed separating the Throop Code into several different laws.[189] They advocated the enactment of a "Judiciary Law," concerning court organization and power, and a "Administrative Law," relating to court administration, which concerned clerks, sheriffs, coroners, stenographers, drawing of jurors, and similar matters. They also suggested eliminating substantive law from the procedural code and placing penalty matters in a "Penal Code." Finally, they proposed a simple and "elastic" rule book, which

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See id. at 190-91.

[185] *Id.* at 191.

[186] J. POMEROY, CODE REMEDIES 640 (5th ed. 1929), *cited in* C. CLARK, 1928 HANDBOOK, *supra* note 175, at 227 & n.56. On the difficulty that the courts had in defining "fact," see C. CLARK, 1928 HANDBOOK, *supra* note 175, at 155-60; J. COUND, J. FRIEDENTHAL & A. MILLER, *supra* note 5, at 391-98; C. REMBAR, *supra* note 32, at 239-46.

[187] *See, e.g.*, Clark, *Fundamental Changes Effected by the New Federal Rules I*, 15 TENN. L. REV. 551, 551 (1939) [hereinafter Clark, *Fundamental Changes*]; Clark, *Procedural Fundamentals*, 1 CONN. B.J. 67, 67 (1927) [hereinafter Clark, *Procedural Fundamentals*]; Clark, *Code Cause, supra* note 146, at 819 (Clark's first subtitle in this article is "The Delusive Exactness of the Codes"); Clark & Surbeck, *The Pleading of Counterclaims*, 37 YALE L.J. 300, 315-16, 328 (1937); Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 916-21 (1976).

[188] President's Address by J. Newton Fiero (Jan. 18, 1893), *reprinted in* 16 N.Y. ST. B.A. REP. 48, 50 (Jan. 18, 1893).

[189] *See* 1898 N.Y. ST. B.A. CODE REVISION, *supra* note 183, at 184-88.

could be easily administered and would include provisions such as more liberal joinder of parties and causes of actions. These Rules were to be controlled by the court. This is, of course, the opposite of the common law notion of integration. It also places the power that Field wanted to leave to the legislature with the courts—the third result of the attack on the Throop Code.

Implicit in these notions was a fourth change: the rules should give judges increased discretion. It was thought that there was no other way to avoid problems of technicality inherent in interpreting the Field Code and the Throop Code. The New York Committee on Code Revision quoted from an 1897 speech by William B. Hornblower that hinted at the great potential in general court rules to broaden the discretionary power of trial judges on a daily basis.[190] After criticizing the "elephantine proportions" of the New York Procedural Code, Hornblower described the movement in the New York Bar Association for the "entire abolition [of the procedural code] and for the substitution of a short Practice Act, like that of Connecticut, relegating matters of detail to rules of court which will be less rigid, less minute and less imperative, so that the courts will be left more free to do substantial justice."[191]

3. Simplified English Procedure

The debate over procedure in America cross-fertilized with the English dialogue; nineteenth century English procedural reform, which drew on the Field Code, became a beacon for later American procedural reformers.[192] Beginning in 1852, there was a series of common law procedure acts and chancery reform acts in England, ultimately leading to the Judicature Acts of 1873 and 1875.[193] These consolidated all of the courts into one Supreme Court of Judicature.[194] The aim was to eliminate multiplicity of law suits between parties and to apply all applicable substantive law and remedies in the same suit. "[P]leading

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[190] *See id.* at 176, citing a portion of the address of William B. Hornblower before the Indiana Bar Association in June, 1897. Hornblower was a member of the Committee on Law Reform of the New York State Bar Association.

[191] *Id.*

[192] *See* C. CLARK, 1928 HANDBOOK, *supra* note 175, at 16; C. HEPBURN, *supra* note 145, at 77, 175-76. Clark's initial "Topical Outline of Proposed Rules" which he sent to the members of the Advisory Committee referred to English practice as well as to the Equity Rules. *See* Supreme Court of the U.S. Advisory Comm. on Rules of Civil Procedure, Topical Outline of Proposed Rules (June 28, 1935), the Charles E. Clark Papers, Sterling Memorial Library of Yale University, Manuscripts and Archives, Box 81, Folder 29 [hereinafter Clark Papers].

[193] *See* C. HEPBURN, *supra* note 145, at 177-83.

[194] *See id.* at 185.

was greatly simplified. It ceased to be technical. The old forms of distinct actions were in effect abolished . . . . A statement of claim was substituted for the common law declaration and the bill in equity."[195] Subject to parliamentary veto, the English Supreme Court was given the power to alter and amend practice and procedure rules and to make new ones.[196] The English ended up with rules of pleading and joinder that were both simpler and more liberal than the Field Code.[197] These English developments, pushing away from a dual common law/equity procedural system, to one looking primarily like equity, were later frequently cited as successful and desirable reforms by participants in the ABA movement for uniform general federal rules.[198]

III. THE HISTORICAL BACKGROUND OF THE FEDERAL RULES: EQUITY TRIUMPHS

During the last two decades of the nineteenth century, there were several attempts within the American Bar Association to have the Conformity Act of 1872 replaced by uniform federal rules. One proposal went so far as to suggest that all civil cases in federal courts be governed by equity practice.[199] All attempts, however, failed to win ABA membership approval.[200]

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[195] *Id.* at 193-94.

[196] *See id.* at 194-97.

[197] *See id.* at 202-04 (on joinder); *see also id.* at 208-24 (on "brevity" and "expedition" in practice).

[198] *See, e.g., Simplification of Judicial Procedure: Hearings on S. Res. 522 Before the Subcomm. of the Sen. Comm. on the Judiciary,* 64th Cong., 1st Sess. 59-60 (1915) [hereinafter *1915 Senate Hearings*] (address of Thomas Shelton, Fixed Interstate Judicial Relations, before the Minnesota State Bar Association on Aug. 20, 1914); C. CLARK, 1928 HANDBOOK, *supra* note 175, at 14-17; T. SHELTON, SPIRIT OF THE COURTS 53, 58-62, 256 (1918) [hereinafter T. SHELTON, SPIRIT]; Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice,* 29 A.B.A. REP. 395, 409-13 (1906) [hereinafter Pound, *Popular Dissatisfaction*].

[199] *See* 9 A.B.A. REP. 78-79, 503-05 (1886); *see also* 11 A.B.A. 70-72, 79 (1888).

[200] *See* 9 A.B.A. REP. 75 (1886). At this time, Field's proposal for "a commission to prepare a federal code of procedure" was ruled out of order. *See id.* at 75. Two years later, the ABA Committee approved a resolution for a federal commission to consider a code for both civil and criminal procedure. *See* 11 A.B.A. REP. 79 (1988). The proposal was stalled in Congress, and the ABA decided to promote uniform federal rules for criminal cases only. *See Report of the Comm. on Judicial Administration and Remedial Procedure,* 15 A.B.A. REP. 313 (1892). Later ABA proposals for, and discussions of, a bill to authorize a commission to look into uniform federal procedural rules for civil and criminal cases are found in 21 A.B.A. REP. 32-43, 454-65 (1898); 19 A.B.A. REP. 22-47 (1896). The discussion in these reports indicate that all of the proposals for uniform civil federal rules were defeated during this period, in large measure because most lawyers and congressmen apparently thought the Conformity Act, requiring federal courts to follow state procedural law as closely as possible, worked tolerably well, and because there was suspicion that New Yorkers wanted to achieve a federal model primarily as a means to attack the Throop Code.

In 1906, Roscoe Pound rekindled interest in procedural reform in his famous address at the annual ABA convention.[201] Five years later, Thomas Shelton began the ABA movement for Congress to pass an Enabling Act authorizing the Supreme Court to promulgate uniform federal rules.[202] Law school professors, such as Charles Clark, joined the bandwagon. What had begun as a reform with deep conservative undercurrents was enacted as New Deal, liberal legislation.

The basic theme sounded by Pound remained as a constant in the movement. Formal procedural rules were no longer appropriate to define, confine, and attempt to deliver substantive law in a predictable manner. Instead, procedure was to step aside and let the substance through. In short, judges were to have discretion to do what was right. While common law and Field-like procedural thought died with the movement, equity lived on through the Federal Rules. The courts continue to live with the chaotic results of this uncontrolled and uncontrolling procedural system.

A. *Roscoe Pound and Procedural Reform*

On August 29, 1906, Roscoe Pound, the thirty-six year-old Dean of the Nebraska College of Law, addressed the twenty-ninth annual meeting of the American Bar Association.[203] His reputation at the time as a botanist, lawyer, and legal educator was primarily local to Nebraska.[204] Like his father, Pound was active in Republican politics and in the local bar association. Also like his father, he had served as a judge.[205] A major theme of Pound's procedural work was the importance of enhancing respect for, and power in, the judiciary.[206] In 1897, Pound wrote an article on why judges should wear robes.[207] He urged that "[e]verything which tends to restore the judiciary to its true position, which tends even in slight manner to give to it in the eyes of the public those long lost attributes of dignity, authority, and eminence,

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[201] *See* Pound, *Popular Dissatisfaction, supra* note 198. For the effect of the speech at the time, see Wigmore, *Roscoe Pound's St. Paul Address of 1906: The Spark that Kindled the White Flame of Progress*, 20 J. AM. JUDICATURE SOC'Y 176 (1937) [hereinafter Wigmore, *Pound*].

[202] *See* 36 A.B.A. REP. 50 (1911) (Shelton suggested that remedies and laws be formulated to prevent delay and unnecessary litigation costs.).

[203] Pound was born on Oct. 27, 1870. D. WIGDOR, ROSCOE POUND: PHILOSOPHER OF LAW 3 (1974).

[204] *See id.* at 123; Wigmore, *Pound, supra* note 201, at 176.

[205] *See* D. WIGDOR, *supra* note 203, at 8-10, 74-101.

[206] Wigdor writes that Pound's teachers at Harvard Law School "led him to a judge-centered view of the legal process, a position not uncongenial for the son of a judge." *Id.* at 47.

[207] *See id.*

which belong of right to the common law judges, is opportune and welcome."[208]

In his historic address on *The Causes of Popular Dissatisfaction with the Administration of Justice,*[209] Pound introduced many of the themes that aided in the breakdown of common law procedural norms and the subsequent substitution of equity-based rules and norms. Pound contended that substantive and procedural common law concentrated too heavily on the individual and private rights, thus neglecting the importance of the community and the need for government protection of the individual.[210] He asserted that methods other than the private law suit would be needed to handle broader social questions.[211] In Pound's view, it was procedure, particularly "contentious procedure," and the "sporting theory of justice" whereby lawyers took advantage of procedural technicalities, that stood in the way of justice.[212]

Pound later expanded on the theme that it was the formalism of the common law writ system and its rigid and inflexible procedural steps that hindered the just application of substantive law and the adjustment of law to modern circumstances.[213] For Pound, a better system would have eliminated procedural interference with the evolution and application of law. "It might well be maintained, indeed, that as between arbitrary action of the law in nearly all cases because of the complexity of procedure, and arbitrary action of the judge in some cases, the latter would be preferable."[214] The idea that procedure should not intermesh with substantive law and help deliver that law, but instead that the judge should be left relatively unhampered to make law and decide cases, comes from equity.[215]

In his speeches and articles between 1905 and 1910, Pound complained that American judges were unduly hemmed in by procedural rules designed to control them and handicapped by their role as umpires who could not "search independently for truth and justice."[216]

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[208] *Id.* at 72 (quoting Pound, *Wig and Gown,* NEB. LEGAL NEWS, July 31, 1897, at 5).

[209] Pound, *Popular Dissatisfaction, supra* note 198.

[210] *See id.* at 403-04.

[211] *See id.* at 403-04. (His examples include rate setting, pure food, and workers' conditions of employment.)

[212] *Id.* at 404.

[213] *See* Pound, *The Etiquette of Justice,* 3 PROC. NEB. ST. B.A. 231, 237-48 (1908) [hereinafter Pound, *Etiquette*].

[214] *Id.* at 249. Pound adds, "[B]ut better checks may be found to restrain the judges than ultraformalism of procedure." *Id.* He does not explain, however, what these checks would be.

[215] *See supra* text accompanying notes 42-67.

[216] Pound, *Popular Dissatisfaction, supra* note 198, at 405; *see also* Pound, *Etiquette, supra* note 213, at 236.

He complained about the unscientific nature of juries, "waste of judicial time upon points of practice," and the "obsolete chinese Wall between law and equity in procedure"; procedure, after all, was "mere etiquette."[217]

During the early twentieth century, while the judiciary was being widely ridiculed for holding social welfare and employee-protective legislation unconstitutional and for granting equitable injunctions against union activity, Pound converted the battlefield from substance to procedure.[218] In addition, Pound argued that professional expertise was required to meet the procedural problems.[219] As part of the needed expertise, judges were to be given the power to make their own procedural rules. These in turn would provide judges with more discretion to overlook procedural mistakes and with a broader and more pliable litigation package. Among other reasons, this was due to enlarged joinder and liberalized pleading.

In 1905, Pound complained about the decadence of equity jurisprudence in America. He claimed equity had lost its discretionary power to do justice in the individual case and had, like common law, become too rigid. He argued that it was important to "fight" for the historic powers of the equity judge.[220] As a result of Pound's controversial 1906 speech, the ABA established a Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation. Pound was appointed to what became known as the Committee of Fifteen.[221] The Committee's reports incorporated principles of administration and procedure that Pound developed.[222] Predict-

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[217] Pound, *Popular Dissatisfaction, supra* note 198, at 412.

[218] *See, e.g.*, Loewe v. Lawler, 208 U.S. 274 (1908); Adair v. U.S., 208 U.S. 161 (1908); Lochner v. New York, 198 U.S. 45 (1905). For sentiment against the judiciary and the corporate bar, see J. AUERBACH, UNEQUAL JUSTICE 31-32 (1976); P. FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 17, 18 (1973); G. ROE, OUR JUDICIAL OLIGARCHY (1912); Fish, *William Howard Taft and Charles Evans Hughes: Conservative Politicians as Chief Judicial Reformers,* 1975 SUP. CT. REV. 123, 125.

[219] On Pound's theme on the need for legal expertise, see, e.g., his comparison of law and lawyers to engineering formulas and engineers. *See* Pound, *Popular Dissatisfaction, supra* note 198, at 401.

[220] *See* Pound, *Decadence of Equity, supra* note 139, at 20-26, 35.

[221] *See* 33 A.B.A. REP. 542-50 (1908); 31 A.B.A. REP. 52, 505, 512 (1907).

[222] *See, e.g.*, Pound, *Appendix E, Principles of Practice Reform,* 35 A.B.A. REP. 635-48 (1910) [hereinafter *1910 Comm. of Fifteen Sub-Comm. Report*] (Pound writing for a Subcommittee of the Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation); Pound, *A Practical Program of Procedural Reform,* 22 GREEN BAG 438 (1910); Pound, *Some Principles, supra* note 171; *Report of the Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation,* 34 A.B.A. REP. 588-602 (1909); 33 A.B.A. REP. 542-50 (1908).

ably, Pound's approach was based in equity.

Pound asserted that procedural rules intended solely to provide for "the orderly dispatch of business, saving of time and maintenance of the dignity of tribunals," as opposed to rules granting parties an opportunity to state their case, should be enforced only within the sound discretion of the court.[223] The common law and Field Code used pleadings as a vehicle to help organize the facts and the law, and to facilitate the application of the latter to the former. For Pound, "the sole office of pleadings should be to give notice to the respective parties of the claims, defenses and cross-demands asserted by their adversaries."[224] In formulating his joinder principles, Pound explicitly turned to equity: "The equitable principle of complete disposition of the entire controversy between the parties should be extended to its full extent and applied to every type of proceeding."[225]

Pound's views that procedure should be made less technical and that judges should be given more latitude accompanied his view that the prevailing notion of substantive law, with formal categories and deduction of results from broad legal principles, did not make sense for modern society. In this period of his writing, Pound suggested that law was in a cycle of development that required new solutions, which, in turn, necessitated overturning formalized rules.[226] He urged that both law and legal decisions should be the outcome of the weighing of social policies, rather than the mechanical application of rules.[227] This thinking supported Pound's more expansive view of judicial power and explained his support for adopting procedural principles of equity.

In his *Popular Dissatisfaction* address, Pound cautioned on the difficulty of achieving a balance between technicality and definition on the one hand, and generality and discretion on the other.[228] He suggested less definition and more judicial discretion.[229] He later asserted

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[223] *See 1910 Comm. of Fifteen Sub-Comm. Report, supra* note 222, at 636-37.

[224] *Id.* at 638.

[225] *Id.* at 642. Regarding appeals, Pound also opted for giving judges relatively free rein, unlimited by formal procedural rules. *See id.* at 646-48.

[226] *See* Pound, *The End of Law as Developed in Legal Rules and Doctrine,* 27 HARV. L. REV. 195, 198, 203, 213, 226-33 (1914); Pound, *Popular Dissatisfaction, supra* note 198, at 398.

[227] *See, e.g.,* 17 T. ROOSEVELT, *Nationalism and the Judiciary* (1911), in WORKS 74, 88-99 (National Edition 1926) [hereinafter T. ROOSEVELT, WORKS]; Pound, *Liberty of Contract,* 18 YALE L.J. 454 (1908-09); Pound, *Mechanical Jurisprudence,* 8 COLUM. L. REV. 605 (1908). For discussion of the new type of balance-test reasoning, see Horwitz, *The Changing Common Law,* 9 DALHOUSIE L.J. 55, 64 (1984).

[228] *See* Pound, *Popular Dissatisfaction, supra* note 198, at 397-98.

[229] Pound said, "From time to time more or less reversion to justice without law becomes necessary in order to bring the public administration of justice into touch with

that "the controlling reason for a systematic and scientific adjective law, must be to insure precision, uniformity and certainty in the judicial application of substantive law."[230] He did not, however, explain how the procedural flexibility and judicial discretion that he favored would aid in such "precision, uniformity, and certainty." The ABA movement that followed Pound's path accepted his equity-based methods, but largely ignored his procedural goals of "precision, uniformity and certainty in the judicial application of substantive law."

B. *Thomas W. Shelton and the ABA Enabling Act Movement*

Thomas Wall Shelton was a Norfolk, Virginia lawyer who, like Pound, was born in 1870. He had his own small law firm and considered his fields of specialization to be corporations, liens, and constitutional law.[231] He thought of himself as a business lawyer. He testified before congressional committees about the twenty-six corporations he represented in six states and indeed considered business "the thing for which you chiefly make laws."[232] In 1912, Shelton was appointed the first chairman of the ABA Committee on Uniform Judicial Procedure.[233] In 1913, he wrote Pound, "The Committee's work has virtually become a business with me," and in 1924 he wrote Chief Justice Taft that the Enabling Act bill "is the most important thing in my life."[234]

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changed moral, social, or political conditions." *Id.* at 398. His belief that he was presently in such a period might help account for his consistent support of procedural solutions borrowed from equity.

[230] Pound, *Etiquette, supra* note 213, at 231. The same language is used in Pound, *Some Principles, supra* note 171, at 388. There, he adds: "For form is, if I must say so, the substance of adjective law." *Id.* at 389.

[231] For biographical information on Shelton, see *Thomas W. Shelton,* 17 A.B.A. J. 282, 282-83 (1931); *Thomas Wall Shelton,* 23 JUDGE & L. 164 (1916-1917); *Shelton, Thomas Wall,* WHO'S WHO IN AMERICA 2000 (1930-1931). Letters from Shelton to Roscoe Pound from 1912 through 1929 show, according to Shelton's business stationery letterhead, that he did not have a very large firm. For instance, a 1912 letter shows only Shelton above a line and Claude M. Bain below it. Letter from Shelton to Pound (Aug. 5, 1912) (available in the Roscoe Pound Papers, Manuscript Division of the Harvard Law School Library, Box 228, Folder 17) [hereinafter Pound Papers]. A June 10, 1918 Shelton letter to Pound shows Shelton and Alfred Anderson alone as "Attorneys and Counselors at Law." *Id.* at Box 228, Folder 17. An August 12, 1929 Shelton letter to Pound shows Shelton and Anderson "Attorneys and Counselors at Law" above the line, and Russell T. Bradford below. *Id.* at Box 82, Folder 4.

[232] *1915 Senate Hearings, supra* note 198, at 13; *see Procedure in the Federal Courts: Hearings on H.R. 2377 and H.R. 90 Before the House Comm. on the Judiciary,* 67th Cong., 2d Sess. 6, 13 (1922) [hereinafter *1922 House Hearings*].

[233] *See* 37 A.B.A. REP. 142 (1912).

[234] Letter from Shelton to Pound (April 5, 1913), Pound Papers, *supra* note 231, at Box 228, Folder 17; Letter from Shelton to Taft (Feb. 4, 1924) (available at reel 261 of the William Howard Taft Papers Collection, Library of Congress, Washington,

Shelton is important to the Enabling Act story not only for the central role he played in lobbying. His candor, enthusiasm, and vacillations in his position, as well as his openness about what values were important to him, provide a window to some of the historic currents and ideology that fueled the Enabling Act and in turn, the Federal Rules. Shelton displayed a pro-Enabling Act mentality. He possessed a set of prejudices, beliefs, and ideas that are representative of the conservatives who supported the Act before the liberals—who, it turns out, shared most of the same ideology—took the Act as their own.[235]

1. Rejecting the Common Law Mentality

From 1910 to 1913, Shelton completely reversed his position. His initial view was that it is critical to control judges and their discretion through formalism and procedural rules in order to achieve constant predictable results and to thwart arbitrary judicial behavior. In a 1910 article, *Simplification of Legal Procedure—Expediency Must Not Sacrifice Principle,*[236] Shelton sounded like Field and that side of Pound's thinking that saw value in more rigorous procedure. Shelton lauded the ability of the common law to provide "a fixed rule of decision and a stability and certainty which has ever marked it, down to this day."[237]

> There was no arranging the procedure to suit the case, a thing horribly to be dreaded, nor the substitution of personal opinion for conclusion of law . . . .
>
> . . . [T]he law is meaningless when enforced, without regard to fixed rules of procedure, sanctioned by precedent, if not tradition. It is worse than meaningless when left to the pleasure or convenience of the court.
>
> . . . .
>
> . . . There is a great deal more in pleading than mere form. It stands . . . as the bulwark of protection between the bench and the litigant; it fixes inviolate limitations within which the judge may rule, making all else *obiter dictum,* and, of equal importance, it confines the testimony which may be introduced.[238]

D.C. [hereinafter Taft Papers]); *see also* Letter from Shelton to Hon. Albert B. Cummins (March 19, 1926), *id.* at reel 281.

[235] *See infra* text accompanying notes 269-74, 290-98, 305-55.

[236] Shelton, *Simplification of Legal Procedure—Expediency Must Not Sacrifice Principle,* 71 CENT. L.J. 330 (1910) [hereinafter Shelton, *Simplification*].

[237] *Id.* at 333.

[238] *Id.* at 333, 337.

In 1911, the year his ABA resolution advocating uniform federal procedure was adopted, Shelton wrote a short article, *The Relation of Judicial Procedure to Uniformity of Law.*[239] He emphasized the need for uniform procedural rules so that decisions in like cases would be uniform. He also continued to stress the importance of controlling judges. For Shelton, procedural rules laudably

> restrict and confine [the judge's] individuality, limit his personal power, and make of him the true impersonation of the blind Goddess of Justice.
>
> . . . . . [T]he common law pleading of England . . . was made to stand and . . . did stand, as a barrier between the Prince and the citizen and as a guarantor of decisions reflecting the true law, the expressed spirit of the times and not the pleasure of the Prince or the Judge.
>
> . . . . . [L]aw is meaningless when enforced without regard to fixed rules of procedure. It is worse than meaningless when left to unfettered individual inclination.[240]

By 1913, however, Shelton's views regarding the judge-controlling features of procedure had changed completely.[241] He wrote very little about restricting and confining judicial discretion. He rather repeatedly wrote about the importance of respecting and empowering the judiciary.[242] He defended the Supreme Court's authority to hold state and federal statutes unconstitutional.[243] He stressed submission to and faith in the courts, in addition to the importance of divorcing the courts from

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[239] Shelton, *The Relation of Judicial Procedure to Uniformity of Law,* 72 CENT. L.J. 114 (1911) [hereinafter Shelton, *The Relation*].

[240] *Id.* at 114, 116-17.

[241] Notwithstanding his views on limiting judicial discretion during the pre-1913 period, Shelton maintained a lifelong attraction of unusual intensity to the judiciary. He was Chairman of the Judicial Committee of the Virginia Bar Association, Chairman of the Committee on Judicial Opinions of the National Conference of Commissioners on Uniform State Laws, Vice President of the American Judicature Society, and a member of the Committee on the Judiciary of the National Civic Federation. He conceived and organized the National Conference of Judges, which later became the Judicial Section of the American Bar Association, and was "known as 'father' of the Interstate Conf. of Judges." *See Shelton, Thomas Wall, supra* note 231, at 2000. Even before his views on procedure changed to embrace judicial discretion and power, however, he placed enormous faith in the Supreme Court. On one occasion, for example, he wrote, "[T]here abides in the people of this country a sublime faith in their highest tribunal that makes of submission the noblest attribute of national character." Shelton, *Uniform Judicial Procedure—Let Congress Set the Supreme Court Free,* 73 CENT. L.J. 319, 322 (1911) [hereinafter Shelton, *Uniform Judicial Procedure*].

[242] *See, e.g.,* Shelton, *Reform and Uniformity of Judicial Procedure,* 76 CENT. L.J. 111, 117-18 (1913) [hereinafter Shelton, *Reform and Uniformity*] (suggesting that improvements be made in the selection and status of judges).

[243] *See id.* at 113.

politics, getting the legislature out of making court rules, and having all judges appointed and with life tenure.[244]

In his 1918 book, written with a religious fervor that makes the title, "Spirit of the Court," appropriate, procedure was no longer primarily presented as a means of controlling judges or of confining and focusing litigation. Now, Shelton argued through the use of several metaphors that procedure should step aside from substantive law. Procedure should be a clean pipe, an unclogged artery, a clear viaduct, or a bridge.[245]

During the 1920's, Shelton urged that procedural rules should be flexible and that it is the tying of judges' hands that leads to "uncertainty, delay, and expense."[246] In 1928, he complained that procedure had become a "fetish,"[247] and a year later asked rhetorically, "Is it the function of the courts to administer justice or to follow technicalities? . . . There is no possible excuse for the defeat of justice through upholding a simple court-made rule of procedure, however binding upon the court a statutory rule may have been . . . ."[248] In 1931, the year of his death, he praised "[t]he English judge [who] brushes aside senseless technicalities in the same spirit he would a house fly."[249]

The transitional years for Shelton were 1911 and 1912. Four events influenced his shift of emphasis: Pound-like thinking, enhanced

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[244] *See, e.g.*, Shelton, *Uniform Judicial Procedure Will Follow Simplification of Federal Procedure,* 76 CENT. L.J. 207 (1913) [hereinafter Shelton, *Uniform Procedure Will Follow Simplification*]; Shelton, *Reform and Uniformity, supra* note 242. In the former article, he wrote that procedure should "not [be] so fettering [of] individuality as to deprive judicial procedure of the saving grace of judicial discretion." Shelton, *Uniform Procedure Will Follow Simplification, supra,* at 207.

[245] *See* T. SHELTON, SPIRIT, *supra* note 198, at 17, 32, 72. Shelton's book is largely a compilation of articles he had previously written. Although both his earlier theme of controlling judges and his newer theme of freeing the courts often appear in his book, he edited some of his former articles to make them more consonant with his new theme that emphasizes more flexible procedure and more power for judges. *Compare, e.g.*, Shelton, *Simplification, supra* note 236, *with* T. SHELTON, SPIRIT, *supra* note 198, at ch. 3 (chapter entitled "Expediency Must Not Sacrifice Principle").

[246] On tying judges' hands, see Shelton, *The Philosophy of Rules of Court,* 13 A.B.A. J. pt. II, 3, 4 (Mar. 1927) [hereinafter Shelton, *Philosophy of Rules*]; *see also* Shelton, *Campaign for Modernizing Procedure,* 7 A.B.A. J. 165, 166-67 (1921) (arguing that the proposed Enabling Act bill would free judges and lawyers to perfect "a simple, correlated, scientific procedural system"); *Report of the Committee on Uniform Judicial Procedure,* 6 A.B.A. J. 509, 516 (1920) [hereinafter *1920 Report*] (advancing similar claims about Supreme Court rulemaking).

[247] Shelton, *Greater Efficacy of the Trial of Civil Cases,* 32 LAW NOTES 45, 48 (1928) [hereinafter Shelton, *Greater Efficacy*] (reprinted from *The Annals* (American Academy of Political and Social Science, March 1928)).

[248] Shelton, *Hobbled Justice—A Talk with Judges,* 13 MINN. L. REV. 129, 129-30 (1929) [hereinafter Shelton, *Hobbled Justice*].

[249] Shelton, *The Drama of English Procedure,* 17 VA. L. REV. 215, 252 (1931) [hereinafter Shelton, *English Procedure*].

by a reprimand from Pound, new Federal Equity Rules, continued discontent in New York with the Throop procedural code, and the progressives' assault on judicial power. These years and forces also helped mold the conservative ideology that became associated with the Enabling Act Movement.

In 1910, Shelton proposed a judge-controlling resolution to the ABA: "*Resolved,* That in whatever form of pleading that may be adopted, there shall be preserved the common law limitation upon the Court, that whatever is not juridically presented, cannot be judicially determined."[250] Pound, writing for a subcommittee of the Committee of Fifteen, was scathing in his critique. Pound suspected that Shelton's real purpose was "to impose upon the committee a doctrine" that courts could not deal with matters "unless and until a technical statement of a cause of action including all the legal elements of case is before it" out of a misguided fear that otherwise "the courts would operate arbitrarily and despotically."[251] Pound contended that even common law procedure gave judges "wide powers of interpretation and ascertainment . . . . [I]t seems puerile to tie the courts hand and foot with procedural details lest they act arbitrarily."[252] Pound called Shelton's proposal for technically correct pleading "historical" and "an anachronism."[253] Such words clearly had a significant impact upon Shelton, who befriended Pound, greatly admired him, and wrote that he was pleased to defer to him in matters of adjective law.[254]

In 1908, at a Virginia Bar Association meeting attended by Shelton,[255] William Howard Taft (soon to be elected President of the

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[250] *See* 35 A.B.A. REP. 48 (1910). Shelton's proposed resolution was transferred to the ABA committee that had been established in response to Pound's 1906 address. *See Report of the Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation,* 36 A.B.A. REP. 448 (1911); *supra* notes 221-22 and accompanying text.

[251] Pound, *Schedule E, Report of Sub-Committee upon the Resolution of Mr. Florance and That of Mr. Shelton,* 36 A.B.A. REP. 480-81 (1911).

[252] *Id.* at 481.

[253] *Id.* at 482.

[254] *See, e.g.,* T. SHELTON, SPIRIT, *supra* note 198, at x (noting Shelton's gratitude toward Pound). Shelton's correspondences with Pound can be found in the Pound Papers, *supra* note 231. On Shelton's friendship and admiration, see, e.g., Letter from Shelton to Pound (Aug. 5, 1912), Letter from Shelton to Pound (June 20, 1916), Letter from Shelton to Pound (Feb. 21, 1918), Letter from Shelton to Pound (June 10, 1918), at Box 228, Folder 17; Letter from Pound to Shelton (Apr. 3, 1920) at Box 158, Folder 17; Letter from Shelton to Pound (Aug. 17, 1921), Letter from Shelton to Pound (Aug. 21, 1922) at Box 32, Folder 25; Letter from Shelton to Pound (May 3, 1929), Letter from Pound to Shelton (May 6, 1929), Letter from Shelton to Pound (May 29, 1929), Letter from Shelton to Pound (May 29, 1929), Letter from Shelton to Pound (Aug. 12, 1929), at Box 82, Folder 4.

[255] *See* 21 VA. ST. B.A. REP. 6 (1908) (list of members registered at the meeting).

United States) advocated that the Supreme Court adopt new equity rules.[256] With the active cooperation of the ABA Committee of Fifteen, the Supreme Court adopted the Federal Equity Rules of 1912, which became effective in 1913.[257] The new rules replaced the outdated Equity Rules of 1842, which had been drafted to operate in the context of historic equity practice.[258] Drawing heavily upon simplified English practice, technical pleadings and demurrers were eliminated and the right to amend was liberalized.[259] Most importantly, testimony was now ordinarily to be taken in open court, rather than by the previous method in equity of submitting documents, and the use of masters was now to be "the exception, not the rule."[260] Discovery was permitted through depositions and interrogatories, but with strict limitations.[261] An important and popular aspect of the reform was the elimination of lengthy documentation in favor of allowing equity judges to hear and evaluate witnesses in person.[262]

Although not unanimous, the opinion of most contemporaneous commentators was that the Equity Rules were simple, efficient, and greatly improved equity practice by appropriately freeing judges from procedural technicalities.[263] Shelton and other uniform federal rule en-

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[256] *See* Taft, *The Administration of Justice—Its Speeding and Cheapening,* 21 VA. ST. B.A. REP. 233, 238 (1908), *reprinted in* Taft, *The Delays of the Law,* 18 YALE L.J. 28 (1908).

[257] 226 U.S. 649, 659-73 (1912). On ABA support and involvement, *see, e.g., Report of the Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation,* 37 A.B.A. REP. 557, 558 (1912); *Report of the Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation,* 36 A.B.A. REP. 448, 457, 460 (1911).

[258] *See* H. HART & H. WECHSLER, *supra* note 114, at 579.

[259] *See* 226 U.S. 649 (1912); Rules 18, 19, 25, 28, 29, 30, 31, 33. For similarity to English rules, see the discussion of each of these rules (following each rule) in J. HOPKINS, HOPKINS' NEW FEDERAL EQUITY RULES: ANNOTATIONS AND FORMS 159-60, 196-230 (8th ed. 1933).

[260] 226 U.S. at 666 (Rule 59, entitled "Reference to Master--Exceptional, Not Usual"). For the rule concerning testimony in open court, see 226 U.S. at 661 (Rule 46, entitled "Trial—Testimony—Usually Taken in Open Court—Rulings on Objections to Evidence").

[261] *See id.* at 661-62, 665-66 (Rule 47, entitled "Depositions—to Be Taken in Exceptional Instances"); Rule 58 ("Discovery—Interrogatories—Inspection and Production of Documents—Admission of Execution or Genuineness.") Interrogatories were not to be taken later than 21 days after the joinder of issue, except by leave of court, and questions were to be limited to "facts and documents material to the support or defense of the cause." *Id.* at 665; *cf.* FED. R. CIV. P. 26 (b)(1) ("Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . .").

[262] *See, e.g.,* Lane, *Federal Equity Rules,* 35 HARV. L. REV. 276, 277 n.4, 278 (1922) [hereinafter Lane, *Federal Equity Rules*].

[263] *See* Lane, *Twenty Years Under the Federal Equity Rules,* 46 HARV. L. REV. 638, 659 (1933) [hereinafter Lane, *Twenty Years*]; Lane, *Federal Equity Rules, supra*

thusiasts repeatedly pointed to the Equity Rules of 1912 as proof that procedure could be made simple and less technical, and that the Supreme Court was an appropriate body to do the drafting, with the help of expert lawyer and judge consultants.[264]

The continuing movement in New York against the Throop Code, a code ridiculed for its technicality, specificity, and lack of flexibility, pushed in the same direction as the new Equity Rules and Pound's thought. A 1912 Report of the New York State Board of Statutory Consolidation, called "Simplification of Practice," relied heavily upon Pound's procedural principles[265] that had been attached to Committee of Fifteen Reports.[266] Following Pound, the Report recommended (i) that judges be permitted to disregard procedural mistakes that did not affect substantial rights, (ii) that there be broad joinder of parties and issues so "that there should be afforded an opportunity for a complete disposition of the entire controversy," and (iii) that judges be given broad latitude to grant summary judgments, directed verdicts, judgments n.o.v., and new trials.[267] Proponents of the Enabling Act, including Shelton and his Committee on Uniform Judicial Procedure, cited approvingly to the Board of Statutory Consolidation's proposals,[268] and reiterated much of the Throop Code criticism.

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note 262; Lane, *Working Under Federal Equity Rules,* 29 HARV. L. REV. 55, 75 (1915) [hereinafter Lane, *Working Under*]; Lane, *One Year Under the New Federal Equity Rules,* 27 HARV. L. REV. 629, 634-38 (1914) [hereinafter Lane, *One Year*]; Wurts, *The New Equity Rules of the United States Courts,* 22 YALE L.J. 241 (1912-13); *The New Rules of Practice for the Federal Courts of Equity as They Abrogate, Modify or Preserve the Old Rules,* 75 CENT. L.J. 381 (1912). *But see* 38 A.B.A. REP. 36, 55 (1913) (comments of Moorfield Storey and J. Hansell Merrill on the inappropriateness of having the Supreme Court issue equity rules and the failure of such rules to achieve uniformity).

[264] *See Reforms in Judicial Procedure: Hearings on the American Bar Association Bills Before the House Comm. on the Judiciary,* 63rd Cong., 2d Sess. 15 (1914); Lile, *Uniform Procedure at Law in the Federal Courts,* 76 CENT. L.J. 214 (1913); Pound, *Reforming Procedure by Rules of Court,* 76 CENT. L.J. 211, 211-12 (1913) [hereinafter Pound, *Reforming Procedure*]; Robbins, *Seeking to Induce Congress to Permit the Supreme Court to Regulate Procedure at Law in Federal Courts,* 76 CENT. L.J. 206, 206-07 (1913); Shelton, *Uniform Procedure Will Follow Simplification, supra* note 244, at 209-11; Shelton, *Reform and Uniformity, supra* note 242, at 115; Shelton, *Uniform Judicial Procedure, supra* note 241, at 319-20; Vinson, *The New Federal Equity Rules,* 76 CENT. L.J. 212, 212-214 (1913); *1920 Report, supra* note 246, at 513-17.

[265] *See* Pound, *Some Principles, supra* note 171.

[266] *See 1910 Comm. of Fifteen Sub-Comm. Report, supra* note 222.

[267] *See* REPORT OF THE BOARD OF STATUTORY CONSOLIDATION OF THE STATE OF NEW YORK ON A PLAN FOR THE SIMPLIFICATION OF THE CIVIL PRACTICE IN THE COURTS OF THE STATE 9-17 (1912). The principles of the Report are summarized in Rodenbeck, *Principles of a Modern Procedure,* 2 J. AM. JUDICATURE SOC'Y 100 (1918).

[268] *See* Burbank, *supra* note 6, at 1058; *1920 Report, supra* note 246, at 543.

The highly charged political climate in the decade before the first World War, particularly concerning proposals for recall of judges, prohibition of labor injunctions, and prohibition of judicial comments on the evidence to juries, deeply influenced Enabling Act proponents. Again, 1912 represents the watershed. Woodrow Wilson and Theodore Roosevelt, running as a progressive candidate, each outpolled Taft, a hero of Shelton's.[269] Eugene Debs, the nominee of the Socialist National Party, garnered almost 900,000 votes.[270] The results, as well as the campaigns, terrified some conservatives. Roosevelt had portrayed the federal judiciary as a major obstacle to progress, and urged judicial recall and other restraints on the federal judiciary.[271] Individuals like Taft and Shelton, who strongly admired the judiciary, saw the courts as the protector of property and republican values, a last moat shielding the country from the wild progressives, the unions, and the masses.[272] Shelton's post-1912 work often displays a sense of panic and warns about the need to protect the judiciary.[273] Shelton, Taft, Chief Justice Winslow of the Supreme Court of Wisconsin, Henry D. Clayton, who drafted and had introduced the first ABA Enabling Act, and others explicitly advocated simplified procedure as a means of improving democracy in order to reduce the cause for bolshevik and other radical attacks on the courts.[274]

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[269] On Shelton's admiration of Taft, see T. SHELTON, SPIRIT, *supra* note 198, at x; Shelton, *Progress of the Proposal to Substitute Rules of Court for Common Law Practice,* 12 VA. L. REV. 513, 520 (1927); Letter from Shelton to Pound (Feb. 21, 1918), Pound Papers, *supra* note 231, at Box 228, File 17.

[270] Also, Democrats substantially increased their control of the House of Representatives, and gained control of the Senate. *See* ENCYCLOPEDIA OF AMERICAN HISTORY 325, 326, 561 (R. Morris & J. Morris eds. 1976).

[271] *See* 2 H. PRINGLE, THE LIFE AND TIMES OF WILLIAM HOWARD TAFT 572-74 (reprint 1964); 17 T. ROOSEVELT, WORKS, *supra* note 227, at 5-22 (speech at Osawatomie, Kansas, Aug. 31, 1910).

[272] *See* G. MOWRY, THE ERA OF THEODORE ROOSEVELT AND THE BIRTH OF MODERN AMERICA 1900-1912, at 43 (1958).

[273] *See* T. SHELTON, SPIRIT, *supra* note 198, at xxi, 23, 78, 80; Shelton, *Hobbled Justice, supra* note 248, at 133; Shelton, *Philosophy of Rules, supra* note 246, at 4; Shelton, *The Struggle for Judicial Independence,* 10 VA. L. REV. 214, 217 (1924); Shelton, *Judicial Courts of Inquiry—An Antidote for the Recall of Judges,* 82 CENT. L.J. 423 (1916). An ABA committee was formed in 1911 to fight the principle of judicial recall. *See Transactions of the Thirty-Fifth Annual Meeting of the Amer. Bar Ass'n,* 37 A.B.A. REP. 52 (1912).

[274] *See 1922 House Hearings, supra* note 232, at 28 (Shelton); Clayton, *Popularizing Administration of Justice,* 8 A.B.A. J. 43 (1922); Taft, *The Attacks on the Courts and Legal Procedure,* 5 KY. L.J., Oct. 1916, No. 2, at 3-4, 22 [hereinafter Taft, *Attacks*] (speech delivered at Cincinnati Law School Commencement, May 23, 1914); Winslow, *Legal Education and Court Reform,* 3 J. AM. JUDICATURE SOC'Y 69, 72-74 (1919). For Shelton's position on socialism and communism, see Shelton, *Police Power Versus Property Rights,* 7 VA. L. REV. 455, 455 (1921) ("It may serve a useful purpose to reflect a moment upon these unwelcome theories, as deplorable as is

The movement for uniform federal procedure was thus a means of deflecting attention from the conservative positions courts had taken on socioeconomic issues. Making courts and their procedure more efficient would reduce the outcry for some popular control over the judiciary. The ironic answer to substantive complaints about judges and their favoring of the rich was to grant judges power to make their own procedural rules. It was thought that these rules should be simple and flexible, not technical. Judges should be given more discretion and more control over juries. The anti-formalistic thinking of Pound and others, the Equity Rules of 1912, New York anti-Throop sentiment, and the politics of the day coalesced and fed upon another in favor of judge-empowering rules.

2. Embracing Equity

Shelton and other proponents of the Enabling Act contended that they neither proposed any specific type of procedure for the federal courts nor knew what type of civil procedure the Supreme Court would ultimately adopt.[275] Given the divergent types of procedure throughout the country, it would not be easy to sell the Enabling Act by advertising in advance what the new procedure would look like.[276] There were, however, multiple indications that the rules would draw heavily on the equity model. In addition to the forces that influenced Shelton away from advocating more rigorous procedure in 1912, procedural history in

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their hostility to the original American idea of government . . . ."). For Taft's political positions, as they relate to procedural reform and court administration, see Fish, *supra* note 218. Strands of the uniform, simple rules package are discretion for judges, increasing judicial power over juries, and endorsing the authority of judges to enjoin union activity and the operation of social welfare statutes. *See* T. SHELTON, SPIRIT, *supra* note 198, at 200-26; Fish, *supra* note 218; Taft, *Attacks, supra*.

[275] *See, e.g., 1915 Senate Hearings, supra* note 198, at 29; S. REP. NO. 892, 64th Cong., 2d Sess. 6 (1917) [hereinafter 1917 SENATE SIMPLIFICATION REPORT]; H.R. REP. NO. 462, 63d Cong., 2d Sess. 1, 5, 8-10 (1914) [hereinafter 1914 HOUSE REPORT]. Senator Walsh, at the 1922 subcommittee hearings, said in answer to a question by another Senator, that he could not anticipate what type of rules the Supreme Court would choose. *See Simplification of Judicial Procedure in Federal Courts: Hearings on S. 1011, 1012, 1545, 2610, and 2870 Before a Subcomm. of the Senate Comm. on the Judiciary,* 67th Cong., 2d Sess. 17 (1922) [hereinafter *1922 Senate Hearings*].

[276] Senator Walsh argued to Enabling Act proponents that lawyers normally preferred the type of procedure used in their own state and that there were important differences in various state procedures. *See 1922 Senate Hearings, supra* note 275, at 18; *1915 Senate Hearings, supra* note 198, at 23-24, 28; Walsh, *Rule-making Power on the Law Side of Federal Practice,* 13 A.B.A. J. 87, 90-92 (1927) [hereinafter *Walsh, Rule-making*]; Walsh, *Reform of Federal Procedure, Address Delivered at Meeting of Tri-State Bar Assn. at Texarkana, Ark.-Tex., April 1926, reprinted in* S. DOC. NO. 105, 69th Cong., 1st Sess. 6-9 (1927) [hereinafter Walsh, *Texarkana Address*], which is also attached to S. REP. NO. 440, 70th Cong., 1st Sess. (1928).

general had been moving in that same direction.[277] Plucknett, in his *History of the Common Law,* for instance, noted the appearance during the eighteenth and nineteenth centuries in England of "the gradual introduction into common law courts of equity procedures and doctrines, which were originally the peculiar province of Chancery."[278] Field borrowed from equity, and it was common to view the Equity Rules of 1912 as embodying the philosophy and spirit of an enlightened, modern procedure.[279] In 1913, a federal judge described the new equity rules in language strikingly similar to the "simplification of procedure" theme of the Enabling Act movement:

> It would seem to be the spirit of these new equity rules that they were drawn by the Supreme Court with the intent of leaving the judge free to adjust the matters in the interests of substantial justice, as he sees fit, unhampered by precedent and by technical definitions and distinctions.[280]

In 1922, Chief Justice Taft urged that the federal system adopt a procedure that merged law and equity.[281] By 1926, Senator Walsh, the primary opponent of the Enabling Act, said that "the practice in equity under rules prescribed by the Supreme Court is pointed to as indicative of what may be expected under the system proposed for the procedure in actions at law."[282] When Walsh wrote to federal court judges in 1926 to canvass their opinion of the ABA-sponsored bill, a respondent, writing in favor of the bill, applauded the simplicity of equity practice in United States courts compared to code states or states with separate courts of law and equity.[283]

Virtually every intellectual, cultural, and political signpost pointed to equity. Supporters of the Enabling Act normally premised their position on the failure of the Conformity Act. As the argument went, the Conformity Act made it difficult to practice in federal court for one did not know what procedural law would apply: state, federal, or judge-

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[277] *See supra* notes 109-274 and accompanying text.

[278] T. PLUCKNETT, *supra* note 24, at 211.

[279] *See supra* notes 128, 133, 264.

[280] Sheeler v. Alexander, 211 F. Supp. 544, 545 (N.D. Ohio 1913) (Day, J.), cited by Lane, *Working Under, supra* note 263, at 74. Lane adds, "This statement [by Judge Day] fairly expresses the purpose of the rules, although the results secured by them in some instances are hardly fulfilling that purpose."

[281] *See* Taft, *Possible and Needed Reforms in the Administration of Justice in Federal Courts,* 47 A.B.A. REP. 250 (1922), *reprinted in* 8 A.B.A. J. 601 (1922); Taft, *Three Needed Steps of Progress,* 8 A.B.A. J. 34, 35 (1922).

[282] Walsh, *Texarkana Address, supra* note 276, at 3.

[283] *See* Letter from Walter Lindley to Walsh (May 26, 1926), Thomas J. Walsh Papers, Library of Congress, Box 302, Legislative File 1913-1933, "Procedural Bill" ca. 1926 [hereinafter Walsh Papers].

made.[284] This difficulty was offered as an example of how procedure interfered with the application of substantive law. Proponents of the Enabling Act went directly from the "failure of the Conformity Act" argument to the contention that procedural disputes generally consumed too much litigation time.[285] They concluded by expressing the need for simplified rules. In support of these points, the proponents cited statistics to show that more cases were being decided in both state and federal courts on procedural than substantive grounds.[286]

This procedural simplicity argument was repeated throughout the Enabling Act's journey to adoption. The following 1926 letter to Walsh from an Illinois Federal District Court judge is representative: "We will all admit, I think, that questions of practice and procedure, not affecting the merits of the question, too often prevent success in a meritorious case. Technicalities of the common law pleading result always in delay and often in miscarriage of justice."[287] Learned Hand wrote Walsh in the same year indicating that he favored the Enabling Act because in New York "the practise is as barbarous as could well be designed" and that despite the New York legislature's reform efforts, the system still reduces "the practise of law to a tangle of rigid provisions."[288] Hand concluded: "The truth is that judicial procedure is like

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[284] *See* 1914 HOUSE REPORT, *supra* note 275, at 4-9; Shelton, *Uniform Judicial Procedure, supra* note 241, at 321-22; *see also Report of the Committee on Uniform Judicial Procedure,* 48 A.B.A. REP. 343, 349 (1923) (stating that the Supreme Court in Bank of the U.S. v. Halstead, 23 U.S. (10 Wheaton) 51 (1825), held that conforming to constant unscientific state legislation unnecessarily burdened "the administration of law and tended to defeat the ends of justice in the national Tribunals"). The critics stress that the expansiveness of the "near as may be" language in the Conformity Act permitted the many exceptions to conformity. *See* Shelton, *Uniform Judicial Procedure, supra* note 241, at 322. Senator Walsh never conceded that lawyers had difficulty knowing what procedures applied in federal court. *See, e.g.,* Walsh, *Texarkana Address, supra* note 276, at 3. Responses to a 1926 letter he sent to federal judges and others put in question the assertion of Shelton and other ABA proponents of the Enabling Act that the Conformity Act was a failure and that most knowledgeable people agreed that it was a failure; the responses from federal district and circuit court judges in the Walsh Papers show approximately 26 in favor of maintaining the Conformity Act and 15 favoring a uniform federal rule approach; four responses do not give an opinion. The responses from U.S. Supreme Court Justices were also mixed (Sutherland and Stone clearly for the Enabling Act; Brandeis and Holmes clearly against; Taft will reply later; Butler, McReynolds, and Van Devanter offer no clear opinion.) Walsh Papers, *supra* note 283, Boxes 301, 302, Procedural Bill. We know, though, of Taft's support for the Enabling Act from many other sources. *See* Burbank, *supra* note 6, at 1069-83.

[285] *See* 1917 SENATE SIMPLIFICATION REPORT, *supra* note 275, at 3.

[286] *See id.* at 2-6. In 1915 Shelton submitted to a Senate subcommittee an ABA table showing "that more than one half of the reported cases now rule on 'procedure.' " *1915 Senate Hearings, supra* note 198, at 46.

[287] Letter from Judge Lindley to Walsh (May 26, 1926), Walsh Papers, *supra* note 283, Box 302, Legislative File 1913-1933, "Procedural Bill" ca. 1926.

[288] Letter from Judge Learned Hand to Walsh (May 25, 1926), Walsh Papers,

history and that nation is happiest which has the least. The notion is at present thoroughly discredited I think in all responsible circles that procedure should be laid down in detail."[289]

The pro-simplicity theme had many aspects, all of which pointed away from common law thinking. Shelton suggested in the 1922 House Judiciary Committee hearings that

> this is one of the things that is making Bolshevists in this country; that frequently, a sensible man, a business man, a practical business man, sits in the courtroom and sees his case thrown out on a technicality that he can not understand, and does not know why it is necessary . . . .[290]

A related theme was that the bar must rid itself of technical lawyers—"procedural sharps" as Shelton called them—who gave the profession a bad name by taking advantage of procedural loop-holes.[291] There was an almost quaint attraction to being modern. The new judicial procedure was to be scientific, flexible, and simple.[292] Commerce and business believed in such simplicity. Businessmen got things done by cutting through technicality, and by not letting rigid, antiquated rules get in their way. Procedure should have been equally straightforward.[293] Both progressives and conservatives were attracted to Frederick Winslow Taylor's thoughts about scientific efficiency.[294]

In addition, there were professionalization aspects to the simplicity

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supra note 283, Box 302, Legislative File 1913-1933, "Procedural Bill" ca. 1926.

[289] *Id.*

[290] *1922 House Hearings, supra* note 232, at 28.

[291] *See 1915 Senate Hearings, supra* note 198, at 12; *see also* 1914 HOUSE REPORT, *supra* note 275, at 7 (quoting Senator Elihu Root's words: "There have arisen a class of lawyers whose sole business and reputation is built upon their ability to make use of statutory technicalities whereby delays are practically endless.").

[292] *See 1915 Senate Hearings, supra* note 198, at 13, 21 (Shelton); *Report of the Committee on Uniform Judicial Procedure,* 5 A.B.A. J. 468, 471-73 (1919) [hereinafter *1919 Report*]. In 1934, when Franklin D. Roosevelt signed the Enabling Act, he said: "For the complicated procedure of the past, we now propose to substitute a simplified, flexible, scientific, correlated system of procedural rules prescribed by the Supreme Court." 3 F.D. ROOSEVELT, THE PUBLIC PAPERS AND ADDRESSES 303, 304 (1938) (statement on signing bill to give the Supreme Court power to regulate procedure in the federal courts, June 19, 1934).

[293] *See, e.g.,* Nims, *How to Speed Justice,* 91 FORUM 273, 275-76 (1934); Shelton, An Efficient Judicial System, Address given to Miss. Bar Assn., May 25, 1915, *reprinted in 1915 Senate Hearings, supra* note 198, at 74-75.

[294] *See* F. FRIEDEL, AMERICA IN THE TWENTIETH CENTURY 36, 37 (2d ed. 1965); A. MASON, A FREE MAN'S LIFE 323-27 (1946) (At a preliminary hearing before the Interstate Commerce Commission, Brandeis pointed out while cross-examining the President of Pennsylvania Railroad that railroads could secure increased revenue through economy and efficiency without burdening shippers and the consuming public.). *But see id.* at 332 (union antagonism to scientific management).

theme. Shelton frequently talked and wrote about a long-suffering business community that had put up with lawyers and their technicalities long enough, and that would look elsewhere (for example, to arbitration) for redress of their problems if the lawyers did not adopt more simple procedures.[295] He also contended that administrative agencies had an advantage over the courts, for they could make their own, simple rules.[296] The rules were to be uniform and simple to aid those lawyers who, like Shelton, advised clients who were engaged in interstate commerce and who thus wanted to practice in several federal courts.[297] Shelton and other uniform federal rule enthusiasts also continually argued that the new rules would be so simple that all lawyers could easily learn them.[298]

Given all of the talk and momentum in favor of simplicity, it was inconceivable that the new system could look like a common law system. Moreover, there were overwhelming practical problems to drafting anything that would resemble a common law system, particularly if law and equity were to be merged. First, as Loomis had found in the prior century, one cannot easily draft common law-like rules for use in a merged system, for the same rules would also have to be used for equity cases.[299] Second, because the push was for court-made procedural rules, one could not argue for rules that would integrate substance and process. Legislatures had the right to legislate in substantive areas, and were increasingly doing so. By definition, judge-made procedural rules are antithetical to a common law integration of substance and process. Third, the Enabling Act anticipated that the Supreme Court would

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[295] *See 1915 Senate Hearings, supra* note 198, at 29; T. SHELTON, SPIRIT, *supra* note 198, at 83-96; Shelton, *A New Era of Judicial Relations*, 23 CASE & COMMENT 388, 392 (1916). Shelton believed that our haphazard procedural system forced attorneys to adhere to technicalities rather than facilitating the issue to be tried, and, therefore, delayed the determination of cases on their merit, thus causing businessmen to turn to arbitration. *See* Shelton, *Greater Efficacy, supra* note 247, at 46.

[296] *See Procedure in Federal Courts, Hearings on S. 2060 and S. 2061 Before a Subcomm. of the Senate Comm. on the Judiciary*, 68th Cong., 1st Sess 55 (Statement of Sutherland, J.), 63 (Statement of T. Shelton) (1924) [hereinafter *1924 Senate Hearings*]; Pound, *Reforming Procedure, supra* note 264, at 211.

[297] *See 1915 Senate Hearings, supra* note 198, at 13, 14. A related argument was that new methods of communication and transportation had erased the meaning of state boundaries; interstate business clients needed uniform law application and uniform decisions that would be applicable in all states. *See id.*

[298] *See 1924 Senate Hearings, supra* note 296, at 72; *1915 Senate Hearings, supra* note 198, at 22, 29. Another related pro-Enabling Act argument, which should be taken with a grain of salt given the ABA professionalization slant of the proponents, was that law should not be kept a mystery from the public. *See id.* at 61-62. Shelton also contended that some lawyers would lose business from the less technical rules. *See id.* at 29.

[299] *See* A. LOOMIS, *supra* note 133, at 10.

promulgate procedural rules.[300] No one body, even with the help of a talented advisory committee, can easily draft procedural rules that separate out various substantive areas and integrate specific elements of a cause of action, procedures, and remedies for each area. It took the common law centuries to evolve. It took Field and the other commissioners almost a decade to draft substantive codes, and their attempts to integrate substance, remedy, and procedure did not approach the complex interrelationships of the common law.[301]

C. *Charles E. Clark and the Professional Cleansing*

Charles E. Clark became the most important of the new breed of procedural reformers who served to dilute the Enabling Act's conservative heritage. Clark, the son of Connecticut farmers, attended both Yale College and Law School. After six years of general practice representing non-affluent clients, Clark became a civil procedure teacher, code procedure treatise writer, and, in 1929, Dean of the Yale Law School.[302] In 1935, he was appointed Reporter of the Supreme Court Advisory Committee that drafted the Federal Rules.[303] With justification, Clark has been called the "prime instigator and architect of the rules of federal civil procedure."[304] Unlike men such as Shelton and Taft, whose zealousness to have the Enabling Act passed may have made them circumspect about describing the procedure they had in mind, Clark was eager to describe exactly what type of rules he contemplated. In Clark, one finds personality traits, experience, and—later on—political leanings, all supporting his open espousal of equity procedure. His times and his associates pushed in the same direction.

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[300] *See* Burbank, *supra* note 6, at 1106.

[301] On common law integration, see *supra* text accompanying notes 29-30. On some integration in Field's substantive code, see, e.g., general rules on measure of damages and variations of measures of damages for 22 specific types of cases ranging from "Covenant to convey land" and "warranty of personal property" to "Injuries to trees, &c," "Injuries to animals," and "Cases of fraud, oppression and malice." *See* 1862 DRAFT CIVIL CODE FOR NEW YORK, *supra* note 147, §§ 1504-1506, at 365-69. The Field Code itself had some integration, such as specific rules for the "Claim and Delivery of Personal Property." *See* 1848 CODE, *supra* note 79, §§ 181-190, at 531-33.

[302] For biographical information on Clark, see 9 WHO'S WHO (1961-1968); Rostow, *Judge Charles E. Clark,* 73 YALE L.J. 1 (1963); *Preface* to PROCEDURE—THE HANDMAID OF JUSTICE: ESSAYS OF CHARLES E. CLARK (C. Wright & H. Reasoner eds. 1965); *Proceedings in Memoriam,* 328 F.2d 5-23 (April 14, 1964). For information on Clark's early practice, I interviewed his friend and former law associate, William Gumbart, in New Haven, Conn. on Dec. 20, 1978 [hereinafter Gumbart Interview].

[303] *See Appointment of Committee to Draft Unified System of Equity and Law Rules,* 295 U.S. 774 (1935).

[304] Rodell, *For Charles E. Clark: A Brief and Belated but Fond Farewell,* 65 COLUM. L. REV. 1323, 1323 (1965).

Starting in 1923, during his fourth year on the Yale Law School Faculty, Clark began a series of articles on procedural topics.[305] Many of the articles later became incorporated in his 1928 treatise, *Handbook on the Law of Code Pleading.*[306] One theme pervades these works: procedural technicality stands in the way of reaching the merits, and of applying substantive law.[307] Throughout his life, Clark kept repeating that procedure should be subservient to substance, a means to an end, the "handmaid and not the mistress" to justice.[308] Clark, a brilliant mathematician in college and a straightforward, noncomplicated writer and thinker, was distressed by what he considered arbitrary procedural lines and categories; he wanted the law applied to the situation without procedural interference.[309]

Clark purported to call upon history in order to make his point. The Chancellor's discretion to issue writs preceded the common law's attempt to organize writs and procedure in a formal way. Common law procedure, therefore, can easily be viewed as a noble effort to rescue equity from disorganization and chaos. Clark viewed equity, however,

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[305] *See* Clark, *History, Systems and Functions of Pleading,* 11 VA. L. REV. 517 (1925) [hereinafter Clark, *History*]; Clark, *The Union of Law and Equity,* 25 COLUM. L. REV. 1 (1925); Clark, *Code Cause, supra* note 146; Comment, *Pleading Negligence,* 32 YALE L.J. 483 (1923) [hereinafter Clark, *Pleading Negligence*].

[306] C. CLARK, 1928 HANDBOOK, *supra* note 175. In Clark, *History, supra* note 305, at 517 n.*, Clark writes: "This article will appear as the first chapter of a forthcoming book on Code Pleading and is here published through the courtesy of the West Publishing Co."

[307] *See* Clark, *Procedural Fundamentals, supra* note 187, at 68; Clark, *History, supra* note 305, at 542; Clark, *Code Cause, supra* note 146, at 817-20; Clark, *Pleading Negligence, supra* note 305, at 485 (The Code's arbitrary restrictions on the term of pleading is a procedural impediment to the resolution of disputes.).

[308] *See* Clark, *The Handmaid of Justice,* 23 WASH. U.L.Q. 297, 297 (1938) [hereinafter Clark, *Handmaid*]; Clark, *History, supra* note 305, at 542 (quoting *In re* Coles, 1 K.B. 4 (1907) (Collins, M.R.)).

[309] Clark's son, Elias Clark, says that Clark got a mathematics prize at Yale College, and thought that mathematics was the best preparation for law school. Interview of Elias Clark, New Haven, Conn. (Dec. 18, 1978). For Clark's disparagement of "arbitrary" lines and attempts at definition, see, e.g., Clark, *History, supra* note 305, at 528 (referring to arbitrary limitations in common law forms of pleading); Clark, *Code Cause, supra* note 146, at 819-20 (The Code's vague, rather than rigid, rules of procedure enabled judges to interpret them so as to decide a case on its merits.); Clark & Surbeck, *supra* note 187, at 316, 328; Smith, *supra* note 187, at 916-21; Clark, *Pleading Negligence, supra* note 305, at 490; *see also Proceedings of Meeting of Advisory Committee on Rules for Civil Procedure of the Supreme Court of the United States* 227 (Clark comments, Feb. 20, 1936). The transcripts of the Feb. 20-25, 1936 Advisory Committee meetings are in six volumes, as part of the Advisory Committee documents donated by Edmund M. Morgan, a member of the Advisory Committee, to the Harvard Law Library. These six volumes are hereinafter cited as Feb. 1936 Transcript. [The totality of manuscripts donated by Morgan to Harvard are hereinafter cited as the Morgan Papers.] For a description of other locations for these, and other documents of the Advisory Committee, see Burbank, *supra* note 6, at 1132 n.529.

as rescuing common law from technicality and rigidity.[310] Clark, following Pound, characterized the common law as "arbitrary" and "highly technical."[311] For Clark, "the rise of the courts of equity served . . . to postpone the necessity of reform for some time."[312] He explained that

> equity procedure was much more flexible in many respects, particularly as to joinder of parties and of actions, and as to the form and kind of judgement which might be rendered. . . . [E]quity procedure itself was designed as a flexible system to meet varying claims and hence was a kind of appeal to those who were attempting to change the harshness and inflexibility of the common law.[313]

As Clark understood it, however, even equity was best viewed as too rigid to "fulfill the needs of a growing and developing system of law."[314] Equity had for centuries been seen as too flexible and too costly; equity's attempt to include all parties and all issues made dispute resolution unmanageable.[315] These are not the aspects of equity Clark describes.

Clark's portrayal of the Field Code and its problems also support his equity-prone view of procedure. He endorsed Field's merger of law and equity, as well as his looking to equity for broader joinder and more flexible remedies.[316] Clark thought, however, that the "original framers of the code" were caught between two inconsistent goals—"taking over equity principles of convenience and flexibility," but also trying "to lay down rigid rules that would leave nothing to discretion."[317] In his view, the Code's emphasis on fact pleading and causes of action prompted courts unwisely to focus on procedure. Instead, he would have preferred that the parties merely tell their stories in the pleadings.[318] Clark also felt that the Field Code had incorrectly

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[310] *See supra* text accompanying notes 26-31. A recent book states: "With other realists, Clark seems to have preferred equity to law simply because of the opportunity it offered to avoid jury trial." L. KALMAN, LEGAL REALISM AT YALE: 1927-1960, at 21 (1986). As my next several pages prove, Clark's attraction to equity, although including antagonism to juries, was rooted in a multi-faceted set of beliefs and agendas.

[311] C. CLARK, 1928 HANDBOOK, *supra* note 175, at 13.

[312] *Id.* at 15.

[313] *Id.* at 16-17.

[314] *Id.* at 17.

[315] *See supra* notes 164-67 and accompanying text.

[316] *See* C. CLARK, 1928 HANDBOOK, *supra* note 175, at 22-23.

[317] *Id.* at 34.

[318] *See id.* at 150-54, 170-79; Clark, *History, supra* note 305, at 544; Clark, *Code Cause, supra* note 146, at 832. Clark thought, however, that forms would be helpful to the pleader. *See* Clark, *The Complaint in Code Pleading,* 35 YALE L.J. 259, 271

stopped short of complete reform in its approach to joinder of parties; Clark believed that it made more sense, as in equity, to permit all interested parties to be in court at once and to adjudicate all aspects of their combined grievances at one time.[319] In short, Clark viewed the codes as a good beginning, but not as a resolution that went far enough. His 1928 treatise suggests several reforms, most of which were borrowed from equity and most of which ended up in the Federal Rules a decade later: freedom in pleading, alternative pleading, broader joinder of parties and issues, ease of counterclaim, intervention, ease of jury waiver, freer power of amendment, declaratory judgment, summary judgement, and flexible relief.[320]

On occasion, like Pound, Clark suggested that well-drafted procedural rules should reach a sensible balance between flexibility and definiteness.[321] Also like Pound, however, he almost always opted for judicial discretion and procedural solutions chosen from equity.[322] His procedural views were reinforced by his attitudes about how lawyers act and by the intellectual climate of the day. Before becoming a law professor, Clark had spent several years in general practice representing ordinary people in smaller cases, including some civil trial work; he had also been deputy judge in the Hamden Town Court.[323] Clark believed that many lawyers used procedure to take advantage of the other side. For instance, defense lawyers, he thought, unfairly tried to limit plaintiffs' stories, and also used process for delay.[324] He placed little stock in the utility of pleadings. In his view, if much were required in pleadings, the lawyers would include everything conceivably relevant to cover themselves, and therefore the pleadings would not be useful.[325] Plaintiffs' lawyers would fight not to be tied down in advance. Defendants would usually have knowledge of the matters in question, without being told much in pleading.[326] Moreover, firm procedural rules would lead to overlitigation by contentious lawyers and nitpicking over proce-

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(1926) [hereinafter Clark, *The Complaint*].

[319] *See* C. CLARK, 1928 HANDBOOK, *supra* note 175, at 214, 255, 256, 270-73, 282-94, 306-07.

[320] *See id.* at 31-38.

[321] *See id.* at vii; Clark, *Handmaid, supra* note 308, at 299, 300.

[322] *See* C. CLARK, 1928 HANDBOOK, *supra* note 175, at 19, 150-51, 255; Clark, *History, supra* note 305, at 548; Clark, *Code Cause, supra* note 146, at 819, 820; *supra* text at note 267.

[323] *See* 9 WHO'S WHO (1961-1968); Gumbart Interview, *supra* note 302.

[324] *See* Clark, *Trial of Actions under the Code*, 11 CORNELL L.Q. 482, 483 (1926) [hereinafter Clark, *Trial of Actions*]; Clark, *Pleading Negligence, supra* note 305, at 489.

[325] *See* Clark, *Pleading Negligence, supra* note 305, at 487-90.

[326] *See* Clark, *The Complaint, supra* note 318, at 260-61; Clark, *Pleading Negligence, supra* note 305, at 489.

dural technicalities, rather than advancing the case to the merits.[327]

In the climate of Robert Hutchins' attempts at Yale Law School, where he preceded Clark as Dean, to discover how law actually works, Clark engaged in a series of empirical studies focused on litigation.[328] In a study of Connecticut trial cases, he confirmed his observation that defendants tended to use the courts for purposes of delay.[329] His opinion of plaintiffs' counsel was hardly more positive; he found that they often made "grossly excessive attachments" and used jury trials to elicit sympathy.[330] He participated in a 1932 report on "Compensation for Automobile Accidents" that castigated the practices of some plaintiff tort lawyers.[331]

Clark issued a preliminary report on his Civil Cases Study of the Federal Courts in May 1934, just before the Enabling Act became effective. Clark found, as he had previously, that plaintiffs usually win when cases go to trial, that few cases reach trial, and that recoveries were surprisingly small.[332] In view of the small amounts, a simpler, less technical procedural system made sense to Clark. He found that many federal claims in federal courts, notably on the equity docket, were more complicated than the tort and contract claims under diversity jurisdiction; he thought that the federal claims might require special litigation techniques. Clark concluded that "to a large extent . . . [the federal] courts may now be considered as the courts for adjudicat-

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[327] *See* Clark, *Handmaid, supra* note 308, at 304, 308, 310, 314; Clark, *Methods of Legal Reform,* 36 W. VA. L.Q. 106, 107, 108, 112 (1929) [hereinafter Clark, *Methods*]; Clark, *Procedural Fundamentals, supra* note 187, at 67; Feb. 1936 Transcript, *supra* note 309, at 227 (Statement of C. Clark).

[328] *See* Hutchins, *Report,* YALE UNIVERSITY REPORTS 1926-1927, at 113, 118 (1927) (Acting Dean Robert M. Hutchins writes of the "good deal of discussion in recent years of the necessity for discovering how the rules of law are working in addition to discovering what they are."). He praises the study of Clark and four research assistants into how the administration of justice is working in a typical jurisdiction. *See also* Hutchins, *Report,* YALE UNIVERSITY REPORTS 1927-1928, at 113, 117-18 (1928) (Dean Hutchins writes that "the most impressive research project which the School has under way is that in the practical operation of the judicial system, managed by a committee under the chairmanship of Mr. Clark.").

[329] *See* C. CLARK & H. SHULMAN, A STUDY OF LAW ADMINISTRATION IN CONNECTICUT: A REPORT OF AN INVESTIGATION OF THE ARTICLES OF CERTAIN TRIAL COURTS OF THE STATE 64 (1937).

[330] *Id.* at 64, 216.

[331] *See* COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS, REPORT 1, 2-3 (participation of Yale School of Law and Clark), 35 (not disclosing the amount of fee), 38 (coaching witnesses), 39 (ambulance chasing) (1932).

[332] C. CLARK, REPORT ON CIVIL CASES OF THE BUSINESS OF THE FEDERAL COURTS 88 (May 1934) [hereinafter Clark, *1934 Federal Courts Report*], later published as AMERICAN LAW INSTITUTE, A STUDY OF THE BUSINESS OF THE FEDERAL COURTS, PART II, CIVIL CASES (1934). The study was of the fiscal year ending June 30, 1930. *See* C. CLARK & H. SHULMAN, *supra* note 329, at 32.

ing various claims involving the central government. This tendency is certain to increase with all the new and various forms of federal legislation recently passed."[333] Given the growth of complex federal cases, a proceduralist would naturally think of the flexibility of equity rules.

Clark felt himself to be part of an exciting new legal, political, and procedural world. Breaking down old formalisms, facilitating the government's regulatory role, exploring new roles for legal professionals, and helping to create a less technical civil procedure were part of the same outlook. The legal realists were urging elasticity and contingency of language and concepts.[334] Clark was impressed with the observation that one could not define what was a fact, evidence, or ultimate fact in a scientific way, and that such terms were best seen as a continuum, without logical cutoff points.[335] The deductive reasoning of the common law was flawed, and set, defined legal categories were suspect. Balancing tests replaced attempts at categorization and definition.[336]

As early as 1928, Clark began to look at law and litigation with the broader focus of an emerging social reformer. Clark perceived litigation as designed for something more than the purpose of merely resolving a dispute between two parties. In his first article describing his empirical research, Clark wrote: "One of the most important recent developments in the field of the law is the greater emphasis now being placed upon the effect of legal rules as instruments of social control of much wider import than merely as determinants of narrow disputes between individual litigants."[337] Unlike Field, who saw law as a means of controlling government, Clark came to perceive the need for government to play a more active role in society.[338]

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[333] Clark, *1934 Federal Courts Report, supra* note 332, at 3-4.

[334] *See* W. RUMBLE, *supra* note 65, at 1-47; Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 812, 821 & n.32 (1935).

[335] *See* C. CLARK, 1928 HANDBOOK, *supra* note 175, at 150-63; Clark, *The Complaint, supra* note 318, at 259 n.1 (acknowledging indebtedness to Cook), 260 n.6 (citing Cook, *Statements of Fact in Pleading under the Codes,* 21 COLUM. L. REV. 416 (1921)); Cook, *'Facts' and 'Statements of Fact'*, 4 U. CHI. L. REV. 233 (1937).

[336] *See supra* notes 227-29. Professor Peter Charles Hoffer has found the nineteenth century origins of such "equitable balancing" in nuisance cases. *See* Hoffer, Balancing the Equities: Injunctive Relief for Nuisance, The Origins of the Managerial Court, and the Legitimacy of Equitable Discretion 3-4 (1987) (unpublished manuscript).

[337] Clark, *Fact Research in Law Administration,* 1 MISS. L.J. 324, 324 (1929).

[338] *See* Clark, *Federal Procedural Reform and States' Rights: To a More Perfect Union,* 40 TEX. L. REV. 211 (1961); Clark, *A Socialistic State Under the Constitution,* 9 FORTUNE 68 (Feb. 1934) (The editors make clear that the title of the article was not chosen by Clark.); Clark, Book Review, 54 YALE L.J. 172 (1944) (reviewing G. PEPPER, PHILADELPHIA LAWYER: AN AUTOBIOGRAPHY (1944)); The New Deal and the Constitution, Discussion by Charles E. Clark, Dean, Yale Law School and Thurman W. Arnold, Professor of Law, Yale University, March 10, 1934, Over the Red Net-

In 1933, Clark was President of the Association of American Law Schools. In an address entitled "Law Professor, What Now?," he exuberantly described the new law professor, who would work in the public interest and participate in the growing national government. He quoted Frankfurter: "New winds are blowing on old doctrines, the critical spirit infiltrates traditional formulas . . . ."[339] During 1934 and 1935, Clark tried to convince the ABA leadership to develop a broader-based organization and to identify for its members "the possibilities of untapped legal business."[340]

Clark's early lists of prospective procedural reforms did not include broad discovery.[341] Edson Sunderland, a University of Michigan Law Professor and member of the Advisory Committee, had spent much of his professional life urging broad discovery techniques. It was he who drafted the Federal Rules discovery provisions.[342] Clark, however, was highly sympathetic to expanded discovery.

For Clark, one way that the legal community could enter the exciting new world was to begin analysis of problems by collecting all relevant data.[343] The quest to ascertain relevant information was at the

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work of the National Broadcasting Company Under the Direction of the League for Industrial Democracy and the National Advisory Council on Radio in Education (available in the Yale Law Library).

[339] C. Clark, Law Professor, What Now?, Address of the President of the Association of American Law Schools at the 31st Annual Meeting (Dec. 28-30, 1933), *reprinted in* 20 A.B.A. J. 431-35 (1934) [hereinafter C. Clark, Law Professor, What Now?] (quoting Frankfurter, *The Early Writings of O.W. Holmes, Jr.*, 44 HARV. L. REV. 717, 717 (1931)).

[340] *See* Clark, *Can the Bar Organize? It Can and Should*, 21 A.B.A. J. 529, 529 (1935); Letter from Clark to William L. Ransom (then a member of the ABA Executive Committee) (March 1, 1935), Clark Papers, *supra* note 192, at Box 81, Folder 29.

[341] *See* C. CLARK, 1928 HANDBOOK, *supra* note 175, at 31-38. In 1929, Clark mentioned "discovery under modern statutes" as a topic investigated at Yale on behalf of the Connecticut Judicial Council, but he looks to trial for bringing out facts, not discovery. *See* Clark, *Methods*, *supra* note 327, at 112-14; Clark & Moore, *A New Federal Civil Procedure II: Pleadings and Parties*, 44 YALE L.J. 1291, 1310 (1935) [hereinafter Clark & Moore II] (mentioning under "Miscellaneous pleading rules," that motions to make more definite and certain and for bills of particulars "need to be supplemented by modern methods of discovery").

[342] On Sunderland's contribution to the discovery rules, see Clark, *Edson Sunderland and the Federal Rules of Civil Procedure*, 58 MICH. L. REV. 6, 10 (1959); Holtzoff, *supra* note 69, at 1072. For Sunderland's early interest in discovery, see Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863, 988 (1933); Sunderland, *Foreward* to G. RAGLAND, DISCOVERY BEFORE TRIAL at iii, iv (1932); Sunderland, *An Appraisal of English Procedure*, 24 MICH. L. REV. 109, 113-16 (1925).

In 1933, Clark wrote enthusiastically about the potential of new and expanded discovery techniques in a brief review of Ragland's book. *See* Clark, Book Review, 42 YALE L.J. 988 (1933) (reviewing G. RAGLAND, DISCOVERY BEFORE TRIAL (1932)).

[343] *See, e.g.*, C. CLARK & H. SHULMAN, *supra* note 329, at 200-02.

heart of his empirical work.[344] Clark urged law professors to collect raw data needed to permit intelligent government regulation and control.[345] An important strand of the thinking of the legal realist movement, so prevalent at Yale during the Clark regime, was the need to accumulate data in order to study and understand human activity.[346] Clark's insistence that the parties should be permitted to tell their story without procedural interference was reinforced by this legal realist infatuation with facts.

It was, of course, equity that emphasized joining all relevant parties and issues, amassing all relevant data, and permitting the Chancellor, with a good deal of discretion, to order what was fair and just. Clark, as well as many of those most connected with the Enabling Act and uniform federal rules project, felt quite comfortable with this type of judicial power. We have seen the ways in which Pound[347] and Shelton[348] embraced the judiciary. It is also important to note how attracted Taft (who wrote major portions of the Enabling Act) and Charles Evans Hughes (the Chief Justice of the Supreme Court when the Enabling Act was passed) were to collecting data and proposing solutions, without procedural or political interference.[349] Clark shared a similar notion of being the expert in control, without restraint. He and virtually everyone connected with urging uniform procedural rules denigrated juries.[350] Clark consistently ridiculed reaching decisions by

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[344] *See supra* notes 328-33 and accompanying text.

[345] *See* C. Clark, Law Professor, What Now?, *supra* note 339, at 433, 434-35.

[346] *See* W. RUMBLE, *supra* note 65, at 21 (suggesting that Clark, Shulman, and Underhill Moore, all of Yale, provided "perhaps the most outstanding examples" of "valuable empirical work" produced during the period); Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience,* 28 BUFFALO L. REV. 459, 495-98 (1979). For the importance of "factual context" to the legal realists generally, see L. KALMAN, *supra* note 310, at 43.

[347] *See supra* notes 206-08 and accompanying text.

[348] *See supra* notes 236-44 and accompanying text.

[349] *See* 1 H. PRINGLE, *supra* note 271, at 148 (quoting Taft, who on January 28, 1900, as Governor of the Philippines, wrote his brothers, H.W. and Horace D.: "Perhaps it is the comfort and dignity and power without worry I like."); *see also id.* at 525-26 (on Commerce Court); 2 H. PRINGLE, *supra* note 271, at 667-69 (using equity procedure to amass facts in antitrust suits), 737, 746 (favoring international arbitration), 915-18 (member of National War Labor Board), 970-72 (dislike of dissenters on the Supreme Court), 1028-29 (judge in large cases). For Taft's participation in the Enabling Act movement, see Burbank, *supra* note 6, at 1069-85. Hughes was, of course, famous for his ability as an investigator, lawyer, statesman, and judge, to manage and resolve situations and cases that involved enormous amounts of data. *See* M. PUSEY, CHARLES E. HUGHES 91, 92, 114, 132-133 (1951) (gas company investigation), 144-152 (insurance company investigation), 168 (coal investigation), 296 (rate cases), 383-84, 387, 389, 415-16, 638-39 (special master), 672-73 (certiorari conferences).

[350] *See* C. CLARK & H. SHULMAN, *supra* note 329, at 78-79; Clark, *Trial of Actions, supra* note 324, at 491; Shelton, *The Judicial Power: The Lawyers' Duty to Protect,* 9 VA. L. REV. 114, 123-24 (1922); Shelton, *Is the Common Law Relation of*

what he called "town meeting" methods.[351] He also criticized the bulk of the members of the bar for having "a horror of any change in the system in which they have been trained and to which they are accustomed."[352] One of his major themes was to leave reform to the experts—people like himself—while at the same time preserving the rulemaking role of the Supreme Court.[353]

Ironically, many strands of the ideology of conservatives who initially sponsored the Enabling Act coalesced with the ideas of liberals who later participated in its enactment and implementation. This is most notably true with respect to expanding judicial power, trusting experts, their lack of faith in juries, and their overall attraction to equity practice.[354]

Homer Cummings, Franklin Delano Roosevelt's first Attorney General, was perfectly typecast to resubmit the Enabling Act to Congress in 1934, after conservatives had failed to accomplish its passage for twenty years.[355] This Democratic liberal chief legal spokesman for New Deal legislation was, like Taft and Hughes, experienced with the big case. His firm in Connecticut represented major banks, manufacturing corporations, and utilities.[356] When he sponsored the Act in 1934, he echoed many of Clark's themes: now was the time for lawyers to give up their technical rules and to aid the government in drafting and implementing new legislation to solve national problems.[357]

Judge and Jury Subject to Legislative Change?, 3 VA. L. REV. 275, 275 (1916); Taft, *Attacks*, *supra* note 274, at 20-21. Many legal realists disfavored the jury, but they generally cherished the dream of becoming judges. *See* L. KALMAN, *supra* note 310, at 21, 43.

[351] *See, e.g.*, Clark, *The Role of the Supreme Court in Federal Rule-Making*, 46 J. AM. JUDICATURE SOC'Y 250, 256 (1963) [hereinafter Clark, *Role of Supreme Court*].

[352] Clark, *Procedural Reform and the Supreme Court*, AM. MERCURY, Aug. 1926, at 445, 446 [hereinafter Clark, *Procedural Reform*]; *see* Clark, *Methods*, *supra* note 327, at 110; Clark & Moore I, *supra* note 69, at 390 (members of the bar would be unwilling to change a system that they had already mastered).

[353] *See* Clark, *Role of Supreme Court*, *supra* note 351, at 257-58; Clark, *Procedural Reform*, *supra* note 352, at 445.

[354] *See supra* text accompanying notes 269-74, 290-98, 305-51.

[355] Ironically, Senator Walsh, who had fought the Enabling Act for twenty years, was Roosevelt's first choice for Attorney General. His death permitted Cummings to become Attorney General, which in turn helped lead to the Act's passage. *See* Burbank, *supra* note 6, at 1063-65, 1081-89, 1095-98; Chandler, *supra* note 1, at 483-85.

[356] *See* THE NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY 13, 14 (1934) (Homer Steel Cummings).

[357] *See, e.g.*, Corey, *Stream-lined Justice, Attorney Gen. Homer S. Cummings Discusses the New Speed in Procedure of the Federal Courts*, NATION'S BUS. 29 (July 1938); Cummings, *The Right Arm of Statesmanship*, 23 A.B.A. J. 7, 8 (1937); H. Cummings, Immediate Problems for the Bar, Address Delivered to the New York County Lawyers' Association (Mar. 14, 1934), Homer Steel Cummings Papers, in Manuscript Dept., Alderman Library, Univ. of Virginia Library, Box 212, *reprinted*

In 1934, the Enabling Act was passed with only modest resistance.[358] When it appeared that the Supreme Court might not merge law and equity, as the Enabling Act permitted, Clark wrote a two-part article with William Moore, strongly urging merger and insisting that the Federal Equity Rules of 1912 should be the basis for the merged system.[359] Part I of their Article ends as follows: "As we shall see, the Federal Equity Rules of 1912, in themselves an embodiment of this best practice, furnish the substantial model for the new Federal procedure of the future."[360] Part II describes how equity rules relating to pleading, joinder, and other procedural issues best accommodate a merged system.[361] Clark and Moore concluded by applauding "flexible rules as to pleading and parties, leaving much to the discretion of the trial court," and by noting the "very close to unanimity of opinion on many, perhaps most of the objectives to be sought in these points of detail."[362]

Clark sent copies of the article to dozens of judges, to legal scholars, and to lawyers.[363] "In this article," he explained, "we urge that the union of law and equity in the federal courts has now gone so far that the federal equity rules ought to provide the basis for a unified procedure under the proposed new system."[364] Edgar Tolman had initially

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in SELECTED PAPERS OF HOMER CUMMINGS 182-84 (C. Swisher ed. 1939).

[358] *See* Burbank, *supra* note 6, at 1096-97; Chandler, *supra* note 1, at 484-85.

[359] *See* Clark, *Fundamental Changes, supra* note 187, at 555. Clark's correspondence indicates that on or about Jan. 2, 1935, Clark was told by Edgar Tolman that he was going to Washington, at the request of the Attorney General and the Chief Justice, to work on procedural rules that would not unite law and equity. Letter from Justin Miller to Clark (Jan. 4, 1935), with copy of "MEMORANDUM TO THE ATTORNEY GENERAL, Subject: Federal Rules of Procedure" (January 4, 1935), Clark Papers, *supra* note 192, at Box 108, Folder 40 . These documents indicate that Clark had written a letter on a train complaining about the decision, and sent it to Miller at the Department of Justice, and Miller relayed the contents to the Attorney General. Clark was already evidently working on an article with William Moore (that Moore had started alone), which later became Clark & Moore I, *supra* note 69, and Clark & Moore II, *supra* note 341. Interview with James William Moore in New Haven, Conn., Oct. 20, 1980.

[360] Clark & Moore I, *supra* note 69, at 434-35.

[361] *See* Clark & Moore II, *supra* note 341, at 1299-1310, 1319-23.

[362] *Id.* at 1323.

[363] *See* form letter, Clark to "My dear" (blank) (Feb. 1, 1935), Clark Paper and two-page list of names headed "Reprints and mimeographed letter of Feb. 1, 1935, sent to the following:" Clark to Hon. Learned Hand (Feb. 2, 1935), Clark to Hon. Kimbrough Stone (Feb. 2, 1935), Clark to Hon. John J. Parker (Feb. 2, 1935), Clark to Hon. Harlan F. Stone (Feb. 2, 1935), Clark to Hon. Benjamin N. Cardozo (Feb. 2, 1935), Clark Papers, *supra* note 192, at Box 108, Folders 40-41; *see also id.* at Box 108, Folder 40. Clark had separate lists of judges and "Justices of the Supreme Court" to whom he sent the articles. *See id.*

[364] Letters, *supra* note 363: Clark to Hon. Harlan F. Stone (Feb. 2, 1935); Clark to Hon. Benjamin N. Cardozo (Feb. 2, 1935). Clark ends these letters: "I am sorry to learn from Major Edgar B. Tolman, recently appointed draftsman of the new rules,

been appointed to be in charge of drafting new rules as a special assistant to the Attorney General, and later became Secretary of the Supreme Court Advisory Committee.[365] A full six months before the Advisory Committee was appointed, Clark wrote Tolman that "a really unified procedure would not involve repudiation of the present satisfactory equity rules, but merely an expansion of them to all actions."[366] Many of Clark's correspondents, including future members of the Advisory Committee, agreed with him.[367] Even Tolman, who did not initially favor utilization of the merger provision of the Enabling Act, apparently looked to equity for the rules to govern law cases.[368]

The composition of the Advisory Committee, appointed by the Supreme Court, reflected both the conservatives, and the professional, professorial liberals who had joined in supporting uniform federal rules. Clark, Sunderland, and three other law professors from elite law schools were joined by nine lawyers, most of whom were associated with what was then considered large firm practice or were active participants in the ABA, and, in most cases, both.[369] The chairman of the

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that a tentative decision has already been reached to draft separate rules for actions at law." *See also supra* note 359.

[365] *See* Clark, *The Federal Rules of Civil Procedure: 1938-1958: Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 439 n.17 (1958) [hereinafter Clark, *Two Decades*]; Letter from Attorney General Homer Cummings to Clark (Jan. 16, 1935), Clark Papers, *supra* note 192, at Box 108, Folder 40.

[366] Letter from Clark to Major Edgar B. Tolman (Jan. 4, 1935), Clark Papers, *supra* note 192, at Box 108, Folder 40.

[367] *See, e.g.*, Letter from E.M. Morgan to Clark (Feb. 28, 1935), with copy of letter Morgan sent to Hon. Harlan F. Stone (Feb. 20, 1935), Clark Papers, *id.* at Box 108, Folder 41; copy of letter from Monte M. Lemann to Major Edgar B. Tolman (Mar. 18, 1935), *id.;* Letter from Evan A. Evans (Judge, 7th Cir.) to Clark (Feb. 4, 1935), *id.* at Box 108, Folder 40; Letter from John J. Parker (Judge, 4th Cir.) to Clark (Feb. 7, 1937), *id.*

[368] *See* Letter from Evan A. Evans (Judge, 7th Cir.) to Clark (Feb. 9, 1935), Clark Papers, *Id.* at Box 108, Folder 40 (describing Tolman's views after meeting with him: "He seemed to think that the rules for actions at law might be very similar to the equity rules and therefore all the benefits of unified procedure would be accomplished.").

[369] In terms of education, type and size of law firm, clients, offices held in professional organizations, and membership in social clubs, the Advisory Committee members, particularly the lawyers, appear to comprise an extremely elite group. The professors were Wilbur H. Cherry, Prof. of Law, U. of Minnesota (B.A. McGill U., LL.B Columbia U.); Charles E. Clark, Dean, Yale U. Law School (Reporter) (B.A., LL.B Yale); Armistead M. Dobie, Dean, U. of Virginia Law School (B.A., M.A., LL.B. U. of Va.); Edmund M. Morgan, Prof. of Law, Harvard U. (A.B., A.M., LL.B. Harvard); Edson R. Sunderland, Prof. of Law, U. of Michigan (A.B., A.M., LL.B. U. of Mich.). The lawyers were William D. Mitchell, N.Y.C. (Chairman); Scott M. Loftin, Jacksonville, Florida, Pres. of the ABA; George W. Wickersham, N.Y.C., Pres. of the American Law Institute; Robert G. Dodge, Boston, Mass; George Donworth, Seattle, Washington; Joseph G. Gamble, Des Moines, Iowa; Monte H. Lemann, New Orleans, Louisiana; Warren Olney, Jr., San Francisco, California; Edgar B. Tolman, Chicago, Illinois. *See* Appointment of Committee to Draft Unified System of Equity

Committee, William D. Mitchell, had been Solicitor General under Coolidge and Attorney General under Hoover before setting up his partnership in New York.[370] The firms that had partners on the Committee, such as Cadwalader, Wickersham, and Taft in New York City and Palmer, Dodge, Gardner and Bradford in Boston, represented leading banks, insurance companies, industries, railroads, and utilities in their communities and throughout the country.[371] The transcripts of Committee deliberations do not reveal a goal of making more work or money for lawyers. The attorneys on the Committee were, however, members of firms that could handle complex litigation; they had clients who could afford to pay for the attorney latitude the new rules would provide. Although there was occasional concern expressed for costs, there was no one on the Committee who was a spokesperson for the small firm, the small case, or the small client.[372]

Two of the members of the Advisory Committee had been judges; it was a joke on the Committee that the other members of the Committee trusted judges and judicial discretion a good deal more than they.[373] Although there were occasional comments by a few members evidencing genuine concern and regard for the jury, discussion of juries was, to a considerable degree, about how important it was for the Committee to appear to the outside world as if they were not impinging on the constitutional right to jury trial.[374] Tort and contract cases were mentioned during deliberations, but much of the discussion was about rate-setting

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and Law Rules, 295 U.S. 774 (1935). On Feb. 17, 1936, George Wharton Pepper of Philadelphia, Pennsylvania was appointed a member of the Advisory Committee "in place of George W. Wickersham, deceased." Order, 297 U.S. 731 (1936). *See* MARTINDALE HUBBELL LAW DIRECTORY (1935) [hereinafter MARTINDALE HUBBELL]; THE NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY (1934); WHO'S WHO, THE AMERICAN BAR (1935).

[370] William DeWitt Mitchell, WHO'S WHO IN AMERICA (1956-1957). Some firms, particularly the more prestigious, did not list representative clients.

[371] *See* MARTINDALE HUBBELL, *supra* note 369, for representative clients of the firms of some of the members.

[372] For an example of concern for poorer litigants, see Feb. 1936 Transcript, *supra* note 309, at 785-86.

[373] Donworth and Olney had been judges. *See supra* note 369. For comment on their being the two "who are strongest against leaving it to the discretion of the court," see Feb. 1936 Transcript, *supra* note 309, at 621 (statement of Dobie).

[374] For comments that may evince a more positive view of the jury, see, e.g., Feb. 1936 Transcript, *supra* note 309, at 840, 841 (Statement of Donworth), 849 (Statement of Olney), 996 (Statement of Olney). For oft-repeated concerns about the appearance of protecting the right to a jury trial, see *id.* at 819, 830-31 (Statement of Donworth), 833-34, 1009, 1424 (Statement of Mitchell), 1010 (Statement of Sunderland). At one point in the deliberations, after Mitchell explained how important it was not to look at Congress as though they were "gypping a man out of a jury trial," Pepper suggested: "It is the one thing in the Constitution they think they understand. (Laughter)" *Id.* at 872.

cases, equity litigation generally, admiralty and patent cases, and potential strike suits against corporations and their officers.[375] When one member observed that they were drafting a code primarily for "actions tried by the court," rather than a jury, no one disagreed.[376]

Before the first meeting of the Advisory Committee, Clark had committed himself to equity procedure.[377] He sent in advance an agenda to the other committee members, describing the topics he thought the committee should consider. His "plan," he wrote, was to have a complete union of law and equity, and to use the federal equity rules as the basis for the new rules.[378] When Clark sent his first draft to the Committee, he observed: "It is fair to say that the rules as drafted follow in general the views set forth in the articles by Mr. Moore and myself previously sent the Committee, as well as in my text on Code Pleading."[379]

D. *The Federal Rules and the Results of an Equity-Dominated System*

During the drafting process, the Pound-Clark vision prevailed. As we will see in Part IV, there were occasional suggestions, and even some rules, that looked in a more confining direction. But the major theme was that procedure should step aside and not interfere with substance. The rules became law in 1938 by congressional inaction.[380]

For Clark, procedural history was a sort of morality play in which the demon, procedural technicality, keeps trying to thwart a regal substantive law administered by regal judges. Clark would use equity procedure to conquer the demon where Field had failed.[381] Removing tech-

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[375] *See* Feb. 1936 Transcript, *supra* note 309, at 343-44, 376, 444, 480, 735-36, 752, 1102, 1151-52, 1174-75, 1288-89, 1308, 1316-17, 1347-48, 1372, 1404-06, 1414-15, 1419-20. A recently published article argues that the Federal Rules were designed in large measure with simple, private, monetary suits in mind. Although also adding that "[e]quity cases were critical to . . . [the drafters'] enterprise . . .," the author severely undervalues, in my view, the dominance of equity in the historical background and underlying assumptions of the Federal Rules. *See* Resnik, *supra* note 14, at 508-15. I appreciate Professor Resnik's notation and consideration of my contrary views. *See id.* at 502 n.33, 508 n.58.

[376] Feb. 1936 Transcript, *supra* note 309, at 1165 ("But the most of the actions for which we are preparing a code here will be actions tried by the court . . . .") (Statement of Olney).

[377] *See supra* text accompanying notes 357-62.

[378] Agenda sent from Clark to Mitchell (June 14, 1935), Clark Papers, *supra* note 192, at Box 108, Folder 42.

[379] Letter addressed "to the Committee" from Charles E. Clark (Oct. 25, 1935), *id.* at Box 108, Folder 43.

[380] *See* Chandler, *supra* note 1, at 505-12.

[381] Clark did recognize, though, that procedure was a field that required continual reexamination. *See, e.g.*, C. CLARK, 1928 HANDBOOK, *supra* note 175, at iv.

nicalities would also make the legal profession more competitive, and would open up new fields for lawyers and courts. The New Deal required courts to resolve new types of complex cases, for which procedural lines would be an outdated impediment. Other cases were so simple they did not need procedural lines and steps. If one eliminated definitional lines and procedural steps, so the argument went, one could have simple general rules for all cases. The rules would be the same for all federal courts, and would become the same for the state courts as well: because the rules would be so simple and flexible, they would serve as a model. Clark boasted that "the only fundamental change effected by the Federal Rules is that there will no longer be any fundamentals in procedure."[382] In the sense of formal procedure designed to define rights and confine disputes, Clark was accurate. The Federal Rules were the antithesis of the common law and the Field Code. Through the Federal Rules, equity had swallowed common law.

In 1976, seventy years after Pound's publication of *Causes of Popular Dissatisfaction with the Administration of Justice* and thirty-eight years after the Federal Rules took effect, leaders of the legal profession met at the Pound Conference to discuss contemporary problems in American litigation.[383] Without realizing it, many of the participants expressed concerns that centered around the likely effects of a procedural system dominated by equity. There were many complaints about costs and delay; rebukes such as these, though, might have been historically issued from critics of either common law or equity procedure. When one looks at the disgruntlement over unwieldy cases, uncontrolled discovery, unrestrained attorney latitude, and judicial discretion, however, the pattern is clear.[384] These are not complaints about the rigor and inflexibility associated with the common law, but the opposite. The symptoms sound like what one would expect from an all-equity procedural system. The praise for modern litigation as a creator of new rights essential for a humane society is also consonant with this diagnosis.[385]

This state of affairs calls for an examination of the methods that have been attempted or considered in order to reinject some common law limitations into this all-equity system. Are there approaches that may help balance equity's creativity with the common law's historic

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[382] Clark, *Fundamental Changes, supra* note 187, at 551; *see also* similar language in Clark, *Procedural Fundamentals, supra* note 187, at 67.

[383] *See* THE POUND CONFERENCE, *supra* note 6.

[384] *See id.*, and *supra* notes 7-16.

[385] *See, e.g.*, A. Higginbotham, Jr., The Priority of Human Rights in Court Reform, address delivered at the Pound Conference, *reprinted in* THE POUND CONFERENCE, *supra* note 6, at 87, 92, 106, 110; *see also* Oakes, *supra* note 77, at 13-16.

quest to deliver predefined rights?

IV. Living with a Procedural System Dominated by Equity

The drafters of the Federal Rules recognized that the system they were creating lacked restraint. Although the drafters considered alternatives, one can see how their own philosophy forced them away from methods that would control and focus the equity-dominated system they created. One can also see, at least in retrospect, why the methods they thought would provide restraint and narrowing did not work as they had hoped.

Many of the paths we are currently exploring to deal with civil litigation—increased judicial management, alternative dispute resolution mechanisms, and emphasis on settlement—also tend to ignore the underlying problems inherent in a procedural system so heavily based in equity procedure. The critical questions are the same today as they have always been in civil procedure: Do we believe that pre-announced substantive legal rules should and can be applied to human conduct with any reasonable degree of consistency and predictability? What is the place of procedure in such a pursuit?[386]

There were counter-views all along from those opposed to the uniform federal rules movement, and even from those who, like Pound and Sunderland, were sympathetic. These opposing views were rooted in a common law tradition that embraced definition and control. The themes rejected in preference for equity may strike a more responsive chord today and can inform a reconsideration of the Federal Rules.

A. *Methods of Containment Rejected and Accepted*

There were occasions during the drafting process when Clark and other members of the Advisory Committee evinced concern about the largely uncontrolled procedure they were creating. Frequently, however, they rejected their own proposals for providing more structure, because their procedural philosophy was centered on expansion, not contraction. They also showed concern about tying their own hands as

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[386] For emphasis on the place of procedure in having substantive law applied in a constant manner, see Clark, *Procedural Fundamentals, supra* note 187, at 62; Pound, *Some Principles, supra* note 171, at 390. Cummings said, " 'Courts exist to vindicate and enforce substantive rights. Procedure is merely the machinery designed to secure an orderly presentation of legal controversies.' " Cummings, *Address of Attorney General Cummings to Judicial Conference, Fourth Circuit,* 21 A.B.A. J. 403 (1935) (quoting a previous statement). There are, of course, other values besides consistency and predictibility that should be furthered by civil adjudication. *See infra* note 465.

lawyers and trusting judges and other court personnel with discretionary power to contain and to control litigation. A few representative examples illustrate the impact of their preference for expansiveness.

The Federal Rules' pleading requirement of having a "claim showing that the pleader is entitled to relief" purposely avoids the "facts" and "cause of action" requirements of the codes,[387] but an initial draft paid more attention to the importance of articulating the underlying events in a litigation. It required a "statement of the acts . . . and occurrences upon which the plaintiff bases his claim or claims for relief."[388] By the second draft, Clark not only had turned to "a statement of the right of action" in his rule on complaints, but also had drafted a rule for all pleadings that required a statement of "facts [(or as an alternative) acts, omissions, and occurrences] without detail, upon which the claims of the pleader are based, omitting mere statements of evidence."[389] During the deliberations, one member proposed adoption of the Equity Rule requiring the statement of "ultimate facts," and said he thought that the proposed pleading rules were "confusing." Clark retorted that his "heart is a little wrung," for "we are erasing difficulties" and every change "is in the direction of flexibility."[390] Former Senator George Wharton Pepper captured the dilemma: "You either state things according to their legal effect, or you state evidence. We say you shall not state them according to their legal effect, and you shall not state the evidence, which leaves zero."[391] The language ultimately adopted of claim entitling relief avoided the distrusted "facts" and "cause of action" language. As Sunderland later pointed out, however, the drafters could avoid the words but not the concepts.[392]

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[387] *See* FED. R. CIV. P. 8(a)(2), 12(b)(6). For avoidance of "fact" and "cause of action," see *1938 House Hearings, supra* note 68, at 94 (statement of Edgar Tolman, Secretary of the Advisory Committee); Sunderland, *The New Federal Rules,* 45 W. VA. L.Q. 5, 12 (1938) [hereinafter Sunderland, *New Federal Rules*]. The question of whether to use the words "facts" and "cause of action" confounded the Advisory Committee early in their deliberations. *See* Advisory Comm. Transcript (Nov. 15, 1935), Clark Papers, *supra* note 192, at Box 94, Folder 2 at 364c, 364d, 365, 366, 387, 417-24; Summary of Proceedings of the First Meeting of the Advisory Comm. on Rules, Held in the Federal Building at Chicago, Thursday, June 20, 1935, *id.* at Box 104, Folder 35.

[388] Rule 23 (Tent. Draft No. 1, Oct. 15, 1935). The various drafts can be found with the Morgan Papers, *supra* note 309, and the Clark Papers, *supra* note 192. For a description of other locations for these, and other documents of the Advisory Committee, see Burbank, *supra* note 6, at 1132-33 n.529.

[389] Rules 10, 11(d) (Tent. Draft No. 2, December 23, 1935).

[390] Feb. 1936 Transcript, *supra* note 309, at 260 (Dodge suggesting Federal Equity Rule 25, including the term "ultimate facts"), 267 (Clark's response).

[391] Feb. 1936 Transcript, *supra* note 309, at 283.

[392] *See* Sunderland, *New Federal Rules, supra* note 387, at 12: "Whether this [eliminating the terms "facts" and "cause of action"] will do any good is very doubtful,

Some of the pleading problems raised by the Rules adopted might have been alleviated by having different requirements for different types of cases. Throughout the deliberations, members suggested differences among states, among types of cases, and between law and equity that might have called for different pleading as well as other requirements. Not one to compromise his reform vision, Clark insisted that the concepts of uniformity and simplicity, and the decision to merge law and equity, usually dictated the same rules for all cases.[393]

Another rejected proposal related to lawyer verification. David Dudley Field and the other Code Commissioners had placed faith in their verification requirement in order to inhibit frivolous claims and defenses and to help narrow the issues through pleadings.[394] Clark's first draft made the lawyer's signature on pleadings a certificate "that to the best of his knowledge, information, and belief, the matters alleged or the denials made therein are true."[395] Edmund Morgan, an evidence expert from Harvard, said: "I do not think it is possible to talk about pleading truthfully," because "[n]obody knows what the truth is . . . in advance."[396] Others thought the proposal that "[a]verments and denials shall be stated truthfully" was "naive." [397] Ultimately, the verification requirement was eliminated.[398]

Proposals to limit discovery were similarly rejected. During the deliberations, members, though, expressed considerable concern about

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for both terms are embedded in the literature of the law and in the vocabulary of the profession"; *see also* Feb. 1936 Transcript, *supra* note 309, at 306 (Statement of Cherry) (stating that he is "not impressed . . . with the idea that we get away from any particular difficulty by a new set of words").

[393] *See* Advisory Comm. Transcript (Nov. 14, 1935), Clark Papers, *supra* note 192, at Box 94, Folder 1 at 56, 56a, 57 (Clark argues for complete merger); Feb. 1936 Transcript, *supra* note 309, at 27-31, 67-79, 94, 95, 252, 1223, 1230-34. At one point, Donworth, speaking of Clark, said: "I know the reporter does not like to recognize the distinction between law and equity cases." *Id.* at 1230. Clark once pointed out: "Reformers must follow their dream and leave compromise to others; else they will soon find that they have nothing to compromise." Clark, *Two Decades, supra* note 365, at 448; *see also Proceedings in Memoriam,* 328 F.2d 5, 9 (April 14, 1964) ("There may have been a touch of the spirit of compromise in his make-up, but I never noticed it.") (Harold R. Medina on Clark).

[394] *See* NEW YORK STATE PRACTICE COMMISSION, FINAL REPORT, *reprinted in* 1 FIELD SPEECHES, *supra* note 128, at 239-40.

[395] Rule 21 (Tent. Draft No. 1, Oct. 15, 1935); *see supra* note 388.

[396] Feb. 1936 Transcript, *supra* note 309, at 355-56.

[397] Rule 11(b) (Tent. Draft No. 2, Dec. 23, 1935); *see supra* note 388. The 1983 amendment to Rule 11 returns part way to Clark's earlier drafts. The amendment requires that all motions and pleadings be based on the attorney's belief, formed after reasonable inquiry and grounded in fact. *See* F. JAMES & G. HAZARD (3d), *supra* note 31, at 154-55; Subrin, *supra* note 88, at 1648-49.

[398] *See* Feb. 1936 Transcript, *supra* note 309, at 326 (Statement of Dodge), 338 (Statement of Mitchell).

their own permissive discovery provisions. First, the possibility of replacing in-court testimony with discovery and documents recalled the problems of unwieldy documentary evidence under the old equity system.[399] One suggestion to harness discovery obligated the party sending out interrogatories to pay "a fee of two dollars plus one dollar for every question in excess of twenty."[400] The greatest fear, however, as particularly expressed by Robert Dodge of Boston and Senator Pepper, was that unsavory plaintiffs' lawyers would use discovery to "blackmail" corporations and their officers.[401] Mitchell, the chairman, predicted, "We are going to have an outburst against this discovery business unless we can hedge it about with some appearance of safety against fishing expeditions."[402] Pepper said the only reason he was less concerned was that he was "morally certain" that such unlimited discovery proposals "will never get by the Supreme Court, I do not care how you dress it up."[403] The Committee also considered whether depositions should be taken before masters or other officers who could rule on objections at that time.[404] Mitchell suggested that depositions be permitted only on motions brought in advance.[405] These proposed discovery restrictions were also rejected.

A final example involved the proposal that judges, upon motion of a party or on their own, make what Clark called an "order formulating issues to be tried."[406] The judges were to be permitted, "after hearing the parties," to find that there "is no real and substantial dispute as to

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[399] *See* Feb. 1936 Transcript, *supra* note 309, at 659-61, 669 (Statement of Mitchell), 670 (Statement of Clark), 672 (Statement of Dobie).

[400] Rule 56(b)(5) (Tent. Draft No. 1, Oct. 15, 1935); *see supra* note 388. This provision was part of the "Depositions by Written Interrogatories" section.

[401] *See* Feb. 1936 Transcript, *supra* note 309, at 735-36 (Statement of Pepper), 736-37 (Statement of Dodge); *see also* W. Mitchell, Summary of Proceedings of the First Meeting, June 30, 1935, at 10 (July 3, 1935) [hereinafter Summary of First Meeting] (noting that "care must be taken to prevent such procedure [discovery] from being used as a basis for annoyance and blackmail, and that possibly it is desirable to have such proceedings conducted by a master or magistrate having power to rule on questions in order to prevent abuse"); *supra* note 388.

[402] Feb. 1936 Transcript, *supra* note 309, at 735 (Statement of Mitchell); *see also id.* at 661, 669-70 (Statement of Mitchell).

[403] Feb. 1936 Transcript, *supra* note 309, at 736 (Statement of Pepper).

[404] *See id.* at 740-41 (Statement of Donworth); Advisory Comm. Transcript (Nov. 14, 1935), Clark Papers, *supra* note 192, at Box 94, Folder 1 at 252 (Wickersham suggests the use of masters to rule on evidence points during discovery, and Mitchell says that Congress will not appropriate money for the job).

[405] *See* Feb. 1936 Transcript, *supra* note 309, at 739, 750-52 (Statement of Mitchell). A representative from the Patent Bar also made this suggestion. *See* Advisory Committee Transcript (Oct. 22, 1936), Clark Papers, *supra* note 192, at Box 96, Folder 15 at 6-7 (Merrell E. Clark, representing the Patent Section Comm. of the ABA).

[406] Rule 24 (Tent. Draft No. 3, March 1936); *see supra* note 388.

any one or more of the issues presented by the pleadings," to "order such issues to be disregarded," and to specify "issues as to which there is any real and substantial dispute" to be tried.[407] Some members of the Committee frowned upon the use of masters and nonjudicial personnel to narrow issues, in part because these were reminders of former abuses in equity.[408] The Committee, however, found that even empowering judges to formulate issues was unattractive. Mitchell, who was usually persuasive when he took a firm position at Advisory Committee meetings, argued that in many districts the judges were too busy to perform the task of narrowing issues and that it would give judges too much power if they could "strike out" an issue without a full record and with no right of appeal.[409] His view prevailed, and Clark's "order formulating issues" provision became a watered down portion of Sunderland's pretrial conference rule.[410]

Although proposals on lawyer verification, discovery, and orders formulating issues were rejected, the Committee did accept some provisions that they thought would confine litigation. Clark and others on the Advisory Committee felt that the discovery, summary judgment, and pretrial conference provisions that were finally adopted would limit the scope of disputes and dispose of frivolous issues and claims.[411] Even at the time of the Rules' adoption, however, there were indications that none of these provisions would go very far toward confining the equity system the Committee had adopted. For instance, Clark's own experience and empirical data showed how uncooperative and adversarial trial lawyers could be; he knew that lawyers had historically tried to

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[407] Rule 24 (Tent. Draft No. 3, March 1936). A similar proposal was contained in Rule 38 (Tent. Draft No. 1, Oct. 15, 1935). *See supra* note 388.

[408] *See* Feb. 1936 Transcript, *supra* note 309, at 669, 674 (Statement of Mitchell), 672 (Statement of Dobie), 729, 735 (Statements of several members), 1078-86 (Statement of Mitchell). There was also fear of "inordinate expense" to the parties as a result of using masters. *See* Advisory Committee Transcript (Nov. 11, 1935), Clark Papers, *supra* note 192, at Box 94, Folder 6 at 1902-03.

[409] *See id.* at 506-07 (Mitchell); *id.* at 509 (Pepper), 510-15.

[410] Rule 16, as passed in 1938, listed the "simplification of issues" as one of the matters that could be considered as part of pretrial procedure.

[411] *See generally* Clark, *The Summary Judgment,* 36 MINN. L. REV. 567 (1952) (providing a detailed description of FED. R. CIV. P. 56); *see also* Clark, *The Texas and the Federal Rules of Civil Procedure,* 20 TEX. L. REV. 4, 10-11 (1941) (suggesting that pretrial procedures would "aid[] in getting to the issue rapidly"); Sunderland, *Discovery Before Trial Under the New Federal Rules,* 15 TENN. L. REV. 737-39, 753, 755 (1939); Sunderland, *Trends in Procedural Law,* 1 LA. L. REV. 477, 487, 497 (1939); Sunderland, *Theory and Practice of Pre-Trial Procedure,* 21 J. AM. JUDICATURE SOC'Y 125, 126-27 (1937) [hereinafter Sunderland, *Theory and Practice*]. The Court itself even expressed such a belief. *See* Conley v. Gibson, 355 U.S. 41, 47-48 (1957) ("[T]he liberal opportunity for discovery and the other pretrial procedures [will] define more narrowly the disputed facts and issues.").

take advantage of opponents by manipulating procedure.[412] Indeed, given the ease of pleading, the joinder possibilities, and the types and scope of discovery, it is difficult to understand how one could be confident that aggressive, creative lawyers—being paid by the hour or anticipating a contingency fee—would not fully utilize the new, largely unbounded procedural playground.

There were also more specific criticisms. In 1936, Judge Edward Finch of the New York Court of Appeals criticized the discovery provisions, warning that the proposed rules would "increase so-called speculative litigation or litigation based on suspicion rather than facts, with the hope that such fishing may reveal a good cause of action as alleged or otherwise . . . ."[413] Moreover the Rules gave so many tools to the person asserting a claim "that it will be cheaper and more to the self interest of the defendant to settle for less than the cost to resist."[414] Mitchell optimistically replied: "It may be that in large metropolitan areas like New York where the conditions are admittedly bad and many dishonest actions are brought in the courts the rules relating to discovery and examination before trial offer opportunities to lawyers of low ethical standards."[415] In the rest of the country, though, Mitchell thought that "the rules relating to these subjects are in line with modern enlightened thought on the subject and will not be" abused.[416]

In addition to the suggestions that discovery would be abused, there were also clues that summary judgment would not dispose of many issues or lawsuits. Clark's empirical data had revealed that motions for summary judgement were not used very often.[417] One member of the Advisory Committee thought that summary judgment will be "rightfully granted in very few cases if the party has a very good lawyer."[418] In 1938, a St. Louis lawyer, perhaps a bit facetiously, illustrated at a bar meeting the weakness of the new summary judgment rule. He proclaimed that, "I have faith enough in the resourcefulness of Missouri lawyers to believe that they will not often get unhorsed by

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[412] *See supra* notes 323-32 and accompanying text.

[413] Finch, *Some Fundamental and Practical Objections to the Preliminary Draft of Rules of Civil Procedure for the District Courts of the United States*, 22 A.B.A. J. 809, 809 (1936).

[414] *Id.* at 810.

[415] Mitchell, *Some of the Problems Confronting the Advisory Committee in Recent Months—Commencement of Actions—Effect of Findings of Fact in Cases Tried by Court Instead of Jury, Etc.*, 23 A.B.A. J. 966, 969 (1937).

[416] *Id.*

[417] *See* C. CLARK & H. SHULMAN, *supra* note 329, at 52 (stating, for instance, that summary judgment was employed in Connecticut in only 60 cases in the years 1929-1932).

[418] Feb. 1936 Transcript, *supra* note 309, at 830 (Donworth).

this rule before the battle is well begun, for want of a simple little affidavit."[419] He assured the other lawyers that "a nice, clean, plausible affidavit" would solve the problem of how "to bring a doubtful lawsuit, or file a general denial to a probably well-founded lawsuit, and hope and work for a compromise as time passes."[420] The multitude of issues permitted under the broad joinder provisions make it very difficult to eliminate dispute over every material fact before trial. Moreover, the same rhetoric of federal rule supporters about not letting procedure stop cases from getting to the merits would dissuade judges from granting summary judgment or imposing strong controls through pretrial conference.[421]

The last device, the pretrial conference, proved equally ineffective at limiting disputes. It is perhaps inevitable that if the parties are given great leeway in pleading, joinder, remedies sought, and discovery, the judge, or a master or magistrate, will have to intervene to limit and confine the litigation.[422] One is reminded of the subtitle that appeared in the favorable 1914 House Judiciary Committee report on the Enabling Act: "Strong Judges and Simple Procedure Needed To-Day."[423] As the Committee's treatment of Clark's proposal for the judicial limitation of issues suggests, however, they were not prepared in their pretrial conference rule to give a great deal of supervisory power to judges. Nor did they feel that busy judges would have sufficient time to manage cases. Some members of the Advisory Committee were also against empowering masters or other court personnel.[424] The Committee had consistently given lawyers ample means to handle cases as they wished,

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[419] F. SULLIVAN, COMMENTS ON THE NEW FEDERAL RULES READ BY FRANK H. SULLIVAN TO THE CAPE GIRARDEAU COUNTY BAR ASSOCIATION 15 (undated pamphlet, but 1937 or 1938 would be the date, given the context); *see also* Clark Papers, *supra* note 192, at Box 105, Folder 36 (black bound volume of Reports and Comments entitled "U.S. Supreme Court Rules for Civil Procedure. Vol. XX. Published Reports and Comments").

[420] F. SULLIVAN, *supra* note 419, at 15.

[421] Ironically, some took the "permitting cases to go to the merits" theme further than Clark himself in summary judgment cases. *See* C. WRIGHT, *supra* note 1, at 668-69.

[422] Sunderland, for example, refers to the English use of masters and the summons for directions as a means of focusing and controlling law suits. *See* Sunderland, *Theory and Practice, supra* note 411, at 128. The comment to Rule 38, Order Formulating Issues to be Tried (Tent. Draft No. 1, Oct. 15, 1935), *see supra* note 339, also suggests some analogy to the "summons for directing" of English practice. Millar suggested that the English, under their merged procedure, "have elevated the directive power to a position probably higher than that which it occupies in any other existing system of civil procedure." Millar, *The Formative Principles of Civil Procedure—I*, 18 ILL. L. REV. 1, 24 (1923).

[423] 1914 HOUSE REPORT, *supra* note 275, at 11.

[424] *See supra* note 408 and accompanying text.

and Clark was most resistant to judges' using the pretrial conference rule to deprive lawyers and their clients of their freedom of action.[425] It turned out that limiting discovery, granting summary judgment, or forcing the elimination of issues at pretrial conference were all at odds with the wide-open system that the drafters had designed.

B. *Coping with an Equity System*

Most human disciplines attempt to select out and define a limited amount of that which makes up the human enterprise. (Thus, the term "discipline.") Whether referring to historians, artists, or scientists, the essential task is one of selection and of picking out the relevant information with which to work, knowing full well that the order is temporary and that omitted variables may turn out to be vital.[426] As a doctrinal model for the resolution of civil disputes, equity permitted the participation of virtually unlimited numbers of people in trials and the consideration of a similar array of theories and facts. The idea was to escape the confinement of the common law. Because equity wanted the whole picture, without boundaries, in its search for a more perfect answer, it was, in essence, undisciplined. Both recent trends to amend the Federal Rules as well as the developments in alternative dispute resolution have emerged, at least in considerable part, in response to the chaos.

The proponents of the Enabling Act and the Federal Rules repeatedly cited the case of *Jarndyce v. Jarndyce* in Dickens' *Bleak House*[427] as representative of the type of technicality that they were trying to avoid by the movement for uniform, simple rules.[428] They apparently forgot that a major point of the novel was the perpetual fog surrounding Chancery. Chancery, Dickens tells us, instilled in its victims "a

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[425] *See, e.g.*, Clark, *To An Understanding Use of Pre-Trial*, 29 F.R.D. 454, 456 (1962) [hereinafter Clark, *Pre-Trial*]. For an example of Clark's protectiveness of the right to a full fledged trial in the pretrial conference area, see Padovani v. Bruchhausen, 293 F.2d 546 (2d Cir. 1961) (vacating a pretrial preclusion order as being at odds with purpose and intent of the federal rules).

[426] This is a central theme throughout J. WHITE, THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION (1973). I have taught a course using this book, and gratefully wish to acknowledge my deep respect for, and the influence of, that superb and challenging volume.

[427] C. DICKENS, BLEAK HOUSE (1853) (Titan ed. 1951) [hereinafter BLEAK HOUSE].

[428] *See* Clark, *Procedural Reform, supra* note 352, at 446; Cummings, *Extending the Rule Making Power to Federal Criminal Procedure*, 22 J. AM. JUDICATURE SOC'Y 151, 151 (1938); Pound, *Popular Dissatisfaction, supra* note 198, at 417; Shelton, *English Procedure, supra* note 249, at 248. They recognized that the suit was in equity, but did not connect that fact with the type of procedure they themselves were proposing.

habit of putting off . . . and dismissing everything as unsettled, uncertain, and confused."[429] It was the search for human perfection, trying to cover everybody and everything, combined with lawyer abuse, that caused the delay, expense, and endless fog in *Jarndyce*[430] and that helps account for the same conditions under the Federal Rules. Equity has no boundaries, and, when standing alone without law, presents a largely lawless system. Maitland warned that "[e]quity was not a self-sufficient system, at every point it presupposed the existence of common law . . . . [If] the legislature said, 'Common Law is hereby abolished,' this decree if obeyed would have meant anarchy . . . . Equity without common law would have been a castle in the air, an impossibility."[431]

Soon after the Federal Rules went into effect there were signs that both lawyers and judges felt a need to limit the system that the drafters had created. Two lines of cases developed and remain, one more liberal than the other, about the degree of specificity that is required under the Rules in initial pleadings.[432] There was an early movement, fought off by Clark and others, to replace the federal pleading rule with a more stringent one.[433] Defendants' regular use of motions for more definite statements and for bills of particulars in order to pin down the plaintiff's story resulted in a rule amendment to curtail such motions.[434]

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[429] BLEAK HOUSE, *supra* note 427, at 2, 3, 18, 157.

[430] *See id.* at 12-13, 89-90, 219, 555.

[431] F. MAITLAND, *supra* note 29, at 19; *see also* THE FEDERALIST NO. 83, at 27-28 (A. Hamilton) (B. Wright ed. 1961).

[432] *See* F. JAMES & G. HAZARD (3d), *supra* note 31, at 152-55. One line of thought requires that the pleadings allege, even if only in sketchy terms, the existence of circumstances that are reasonably believed to be true and that if true would entitle the party to relief. The other line established that a pleading is sufficient unless it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief." Conley v. Gibson, 353 U.S. 41, 45-46 (1957). In any event, the plaintiff is permitted to allege the claim in general terms.

[433] This was especially true in the Ninth Circuit. *See Claim or Cause of Action: A Discussion on the Need for Amendment of Rule 8(a)(2) of the Federal Rules of Civil Procedure,* 13 F.R.D. 253 (1952). The proposed amendment to Rule 8(a)(2) would have required the pleader to give "a short and plain statement of the claim showing that the pleader is entitled to relief, which statement shall contain the facts constituting a cause of action." *Id.* at 253. For an example of Clark's resistance, see, e.g., ADVISORY COMM. ON THE RULES OF CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 18-19 (October 1955) (stating that "Rule 8(2) envisages the statement of circumstances, occurrences and events in support of the claim presented . . . . [N]o change in the rule is required or justified."); U.S. SUPREME COURT ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, EXPERIENCE UNDER THE FEDERAL RULES OF CIVIL PROCEDURE 11-18 (1953) [hereinafter EXPERIENCE UNDER THE RULES] (submitted by Charles E. Clark, Reporter).

[434] The amendment to Rule 12(e) abolished the use of motions for a bill of particulars, and limited the motion for a more definite statement only to where the movant cannot reasonably be required to frame an answer or response to the pleading in question. For a background discussion of the 1948 amendment to FED. R. CIV. P. 12(e), see

Some courts tried (and continue to try) to develop more demanding pleading requirements for specific types of cases, such as antitrust and civil rights.[435] Some judges, to Clark's outrage, soon tried to use pretrial conference orders to achieve more specificity in the recitation of claims and defenses.[436] Many district courts started using local rules, such as those limiting the number of interrogatories, to attempt to control the wide-open nature of Federal Rule discovery.[437]

Concern about the failings of, and abuses under, the Federal Rules system has heightened in recent years. A 1980 amendment adding discovery conferences, as well as the 1983 amendments relating to pretrial conference and the attorney's certification on motions, pleadings, and discovery, represent conscious attempts to pull back from the lenient policies that lay behind the Federal Rules.[438] Recent proposals to amend Rule 68 in order to shift attorneys' fees to the losing side reveal a similar desire to place counter-incentives to the amount and scope of litigation.[439]

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5 C. WRIGHT & A. MILLER, *supra* note 1, §§ 1374-1376, and Committee Notes to 1948 amendment to FED. R. CIV. P. 12(e), *reprinted in* 12 C. WRIGHT & A. MILLER, *supra* note 1, at 385-86.

[435] *See* 5 C. WRIGHT & A. MILLER, *supra* note 1, § 1228 (antitrust, monopoly, and restraint of trade); 2A J. MOORE, *supra* note 76, §§ 8.17(3) (antitrust), 8.17(4-1) (civil rights); Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure,* 86 COLUM. L. REV. 433, 447-50 (1986) (observing a similar tendency in securities fraud and civil rights cases). For Clark's resistance to different pleading rules for different types of cases, see Nagler v. Admiral Corp., 248 F.2d 319 (2d Cir. 1957) (Clark, J.) (antitrust); Clark, *Special Pleading in the "Big Case,"* 21 F.R.D. 45 (1957).

[436] *See* Clark, *Pre-Trial, supra* note 425, at 459 (Clark notes, "The basic concept of [pretrial conference orders should be to settle] points of *agreement* between [the parties].").

[437] *See* J. SHAPARD & C. SERON, ATTORNEYS' VIEWS OF LOCAL RULES LIMITING INTERROGATORIES 5 (Federal Judicial Center Staff Paper 1986) (table I compares the size of courts with limitations on the number of interrogatories); Cohn, *Federal Discovery: A Survey of Local Rules and Practices in View of Proposed Changes to the Federal Rules,* 63 MINN. L. REV. 253, 276-81 (1979).

[438] *See, e.g.,* Committee Notes to 1983 amendments to FED. R. CIV. P. 11, 16, 26, *reprinted in* 12 C. WRIGHT & A. MILLER, *supra* note 1, at 111-21 (1986 pocket part) (noting that the rules are amended to deter abuse more forcefully); Committee Note to 1980 amendment adding FED. R. CIV. P. 26(f), *reprinted in* 12 C. WRIGHT & A. MILLER, *supra* note 1, at 119-20 (1986 pocket part) (noting the committee's awareness of abuse of discovery).

[439] *See, e.g.,* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure, Federal Rules of Civil Procedure, etc., Rule 68 and Committee Note,* 102 F.R.D. 407, 432-37 (1984); Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, Rule 68 and Committee Note,* 98 F.R.D. 337, 361-65 (1983); Note, *The Proposed Amendment to Federal Rule of Civil Procedure 68: Toughening the Sanctions,* 70 IOWA L. REV. 237, 247-49 (1984).

Although these and other developments reveal an awareness of some of the problems inherent in an all-equity system, they do not sufficiently address the underlying issue: how to achieve a reasonable measure of constancy and predictability in law application. Amended Rule 11, making the attorney's signature a certificate that the pleading is "well grounded in fact" and "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law," illustrates the point.[440] This rule seems to look backward to the Field Code's pleading requirement of "facts constituting a cause of action."[441] But the pleading rules themselves remain untouched, and the lawyer is not given concrete guidance about how much she must know or plead in advance to bring a specific kind of case. The lawyer and client are told that they may be fined after the fact for noncompliance, but they are not told for any particular type of case what appropriate lawyering requires.

A more logical approach to pleading and signature requirements would require reconsideration of several different tenets that underlie the Federal rules. Providing more guidance for lawyers and their clients would necessitate inroads on trans-substantive procedure. Some types of cases may permit lawyers to know more about the facts at the initial pleading stage than others.[442] Perhaps there should be different procedural rules for different types of cases.[443] But this also means confronting the demons of technicality, line-drawing, and definition. The honing of procedure to fit and confine substance and the use of categories will begin to look more like the common law mentality. Moreover, one cannot discuss what procedure should go with what substantive areas without acknowledging that the choices will deeply affect the substantive law and influence which cases are brought and won. This suggests a more active role for legislators in procedural rulemaking.[444]

Other trends attempting to limit the amount and scope of litigation

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[440] *See* the 1983 Amendment to FED. R. CIV. P. 1.

[441] *See* F. JAMES & G. HAZARD (3d), *supra* note 31, at 154-55; *supra* text accompanying notes 143-51.

[442] *See* Marcus, *supra* note 435, at 459-65.

[443] For examples, see MANUAL FOR COMPLEX LITIGATION 186-373 (5th ed. 1982). The Federal Bankruptcy Rules are also different in many respects from the Federal Rules of Civil Procedure, and many states have different procedures for cases in probate court, particularly domestic ones, and malpractice cases. Workers compensation is yet another field in which substance and procedure have been integrated.

[444] *See* H.R. REP. No. 422, 99th Cong., 1st Sess. 13 (1985) (discussing criticisms of the rulemaking process and attempts to standardize the process); Landers, *supra* note 30, at 858-59, 900 (arguing for congressional class action litigation); *cf.* Marek v. Chesny, 105 S. Ct. 3012-17 (1985) (interpreting federal statutes regarding awarding attorneys fees, such that plaintiff obtains "effective" representation in a suit under 42 U.S.C. § 1983).

in contemporary civil procedure run directly counter to procedural reform efforts engaged in earlier in the century. For example, two of the major purposes of the Equity Rules of 1912 were to reduce reliance on documentation and masters.[445] It was thought important for judges to hear testimony in open court, for this would permit them to consider credibility issues and to understand cases better than could be achieved by reading lengthy documents.[446] Today's increased reliance on magistrates and on documents created in discovery and as a result of pretrial conference orders emphasizes pretrial procedures rather than trial before a judge. Some now suggest that the testimony in complex cases be primarily presented through "narrative written statements," thereby returning us to equity practice before it was reformed to require testimony in open court.[447] Clark wanted to reduce the number of procedural steps, but his legacy is a staggering array of possibilities: pleadings, discovery conferences, several pretrial conferences, discovery itself, hearings on motions, separate hearings to sanction lawyers for violating their obligations under the new signature certification rules and the new pretrial conference provisions, summary judgment hearings, and hearings on costs and attorneys' fees.[448] The broad joinder provisions, increased reliance on magistrates, emphasis on documentation, and proliferation of distinct procedural steps may make *Jarndyce v. Jarndyce* look like a minor skirmish.

Proponents of the Enabling Act and the Federal Rules wanted procedure to step aside so that cases could more easily be decided on the merits.[449] But now that we have lived under the Federal Rules, it is apparent that we have moved away from this goal. An all-equity procedure may be so expensive that many legitimate lawsuits are not initi-

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[445] *See* Lane, *Federal Equity Rules, supra* note 262, at 277-79, 295-97. But apparently many lawyers initially opposed the introduction into equity cases of oral testimony in open court. *See* Lane, *One Year, supra* note 263, at 639. There is also the testimony of a representative from the patent bar who feared that extensive discovery would eliminate the advantages of trying patent cases in open court rather than through the former method of utilizing a voluminous documentary record. (His simultaneous espousal of trans-substantive procedure was, however, at odds with limiting the use of discovery in patent cases, while not limiting it in other kinds of cases.) *See* Advisory Committee Transcript (Oct. 22, 1936), Clark Papers, *supra* note 192, at Box 96, Folder 15 at 14-16 (Merrell E. Clark, Representing the Patent Section Comm. of the ABA).

[446] *See, e.g.,* Breckenridge, *The Federal Equity Practice,* 5 ILL. L. REV. 545, 548-49 (1911); Lane, *Twenty Years, supra* note 263, at 642-643.

[447] *See* W. SCHWARZER, MANAGING ANTITRUST AND OTHER COMPLEX LITIGATION § 7-3(A) (1982); Richey, *A Modern Management Technique for Trial Courts to Improve the Quality of Justice: Requiring Direct Testimony to be Submitted in Written Form Prior to Trial,* 72 GEO. L.J. 73 (1983).

[448] *See* Feb. 1936 Transcript, *supra* note 309, at 227.

[449] *See supra* text accompanying notes 210-12 & 305-09.

ated.[450] Under the alleged pressure of court congestion, there has been an increase in the use and scope of gate-keeping and justiciability barriers.[451] Because so much can be considered in a case under the Federal Rules, res judicata and collateral estoppel doctrine has been expanded to prevent subsequent cases or to preclude the retrial of issues.[452] But the most astonishing development is the current emphasis on case management, settlement, and methods of alternative dispute resolution.[453]

I lump the three phenomena together for they frequently have common tendencies. All three often draw on efficiency goals and the time and costs of litigation in order to move away from focusing on the trial and towards something else, whether mediation, conciliation, or the ultimate goal of settlement.[454] Some judges now feel that they have failed if they are forced to hear a case at trial.[455]

There is a relationship between these three phenomena and the

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[450] *See Hearings on the State of the Judiciary and Access to Justice Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary,* 95th Cong., 1st Sess. 4, 5 (1977) [hereinafter *1977 House Hearings*] (stating that the high cost of legal service makes it counterproductive to seek legal aid to resolve minor disputes); Rosenberg, Rient & Rowe, *Expenses: The Roadblock to Justice,* 20 JUDGES J., Winter 1981, at 16, 17 ("There is sound evidence that the expense of litigating . . . warps the substantive law, contorts the face of justice, and, in some cases, essentially bars the courthouse door."). In 1980, a Chicago lawyer wrote, "[T]he effect [of discovery] in smaller cases may render the litigation so prohibitive as to preclude it completely. Some years ago, for example, a New York City laywer told me his firm had found that it could not handle economically any matter worth less than $1 million." Kahn, *Discovery Made Simpler (and Cheaper),* 6 LITIGATION 3 (Winter, 1980).

For a skeptical view on the question of whether there are increased costs in modern litigation, see Trubek, Sarat, Felstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation,* 31 UCLA L. REV. 72 (1983) (conceptualizing litigation as an investment).

[451] Many scholars believe that the Burger Court has effectively limited Warren Court constitutional rights by narrowly construing access concepts such as standing, abstention, and exhaustion, while restricting remedies and limiting attorney's fees. *See 1977 House Hearings, supra* note 450, at 11-19 (prepared statement of Ralph Nader); Neuborne, *The Procedural Assault on the Warren Legacy: A Study in Repeal by Indirection,* 5 HOFSTRA L. REV. 545 (1977); *see also 1977 House Hearings, supra* note 450, at 112-117 (statement of Burt Neuborne) (arguing that reforms such as expanding the judiciary, abolishing diversity jurisdiction, and increasing the role of class actions, among others, would help limit court congestion).

[452] *See* F. JAMES & G. HAZARD (3d), *supra* note 31, at 589; RESTATEMENT (SECOND) OF JUDGMENTS § 13, § 17, § 24 (1982).

[453] *See supra* note 17.

[454] *See* S. GOLDBERG, E. GREEN & F. SANDER, *supra* note 17, at 5 (although the authors question whether alternatives will have a significant impact on court congestion); Galanter, *Judge As Mediator, supra* note 17, at 260-61; Committee Note to 1983 Amendment to FED. R. CIV. P. 16, *reprinted in* 12 C. WRIGHT & A. MILLER, *supra* note 1, at 114-19.

[455] *See* Galanter, *Judge As Mediator, supra* note 17, at 261-62; Neubauer, *Judicial Role and Case Management,* 4 JUST. SYS. J. 223, 227-28 (1978).

movement to equity procedure. To see the connection one must reconsider how adjudication historically developed. The major purpose of courts was not just to resolve disputes. They could have done that with the ancient trial by ordeal or by flipping coins. As Lon Fuller and others have taught us, it is resolving disputes through reasoned and principled deliberation, based on rules, that is at the heart of adjudication.[456] This is what should give courts and judges their legitimacy. In large measure it is the law-applying, definitional, and predictive aspects of law that justify law as an enterprise. Justice Harlan makes the point:

> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly predictable manner. Without such a "legal system," social organization and cohesion are virtually impossible . . . . Put more succinctly, it is this injection of the rule of law that allows society to reap the benefits of rejecting what political theorists call the "state of nature."[457]

At common law, procedure joined with substance in order to achieve law application and rights vindication. As Pound suggested, form is the essence of procedure.[458] A procedural system based on equity, however, no longer provides that form, and consequently no longer provides the definition, confinement, and focus that aid in law application and rights vindication. A goal of mediation and conciliation, and perhaps to a lesser extent case management, is to avoid judicial application of the law, or at least formal application of the law.[459] Set-

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[456] Fuller, *The Forms and Limits of Adjudication,* 92 HARV. L. REV. 353 (1978) [hereinafter Fuller, *Forms and Limits*].

[457] Boddie v. Connecticut, 401 U.S. 371, 374 (1971).

[458] Pound, *Some Principles, supra* note 171, at 389. Pound uses the terms "procedure" and "adjective law" interchangeably. *See id.* at 388-89. The actual quote is: "For form is, if I may so, the substance of adjective law." *Id.* at 389.

[459] *See* S. GOLDBERG, E. GREEN & F. SANDER, *supra* note 17, at 8, 9 (tables, especially the columns "Mediation" and "Negotiation" under the characteristics "Degree of Formality" and "Outcome," which point out the "informal unstructured" and nonjudicial "mutually-acceptable" outcomes reached by these dispute resolution mechanisms); *see also* Fuller, *Mediation—Its Form and Functions,* 44 S. CAL. L. REV. 305 (1971) (supporting the proposition that mediation avoids direct application of law). Notwithstanding the drift to settlement as a goal for many judges, *see supra* note 17 and accompanying text, and the explicit emphasis on settlement in the Advisory Committee Note to the 1983 Amendments to Rule 16, case management can be used to help focus issues and to make application easier and better, whether at the negotiation stage

tlement is the most frequently stated goal. Case management and alternative dispute resolution enthusiasts have largely given up on trying to bring cases to the merits, that is, on getting law applied or rights vindicated.[460] Perhaps it should not be a surprise that the equity-dominated system leads to a solution where the highest goal is for courts not to apply law to facts. When one seeks human perfection amidst so many parties, so many issues and so much discretion, perhaps it becomes impossible to apply law in a rational, predictable manner.

There are, of course, disputes in which the application of law is unimportant or less important than other values. For instance, a custody battle may be such a dispute.[461] In most disputes that have historically come to courts, however, at least one party is calling upon the coercive power of the state to have law applied. To the extent that advocates of case management, settlement, or alternative dispute resolution give up on law application, they are giving up on the essence of adjudication. Ironically, their attempt to remedy the flaws in judicial dispute resolution rejects the major function that courts perform.

Commentators on case management, settlement, and alternative dispute resolution observe that the vast majority of cases settle and that this may have always been true.[462] Moreover, settlement occurs frequently in the shadow of the law, in the sense that the negotiations are based, in part, on an anticipated trial result.[463] Such an observation, however, requires that civil procedure sufficiently confine and focus the law so that one may predict results. Otherwise, bargaining is in the shadow of a shadow. It also requires that the more formal dispute reso-

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or a trial. *See, e.g.*, FED. R. CIV. P. 16(c)(1), (2), (3), (4), (5). A recent article suggests that case management is an evolutionary step in modern procedure. *See* Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306 (1986). My research, and this Article suggest, however, that the need to "case manage" is inherent in an all-equity system, because of equity's innate expansiveness and amorphousness.

[460] I am not talking about arbitration or alternative dispute resolution mechanisms such as the mini-trial, which can take law application quite seriously. *See, e.g.*, the tables described *supra* note 437, and in S. GOLDBERG, E. GREEN & F. SANDER, *supra* note 17, at 189-91, 271-78.

[461] If the parties have an on-going relationship or the dispute is polycentric, mediation may make more sense than adjudication. *See, e.g.*, Goldberg, Green & Sander, *ADR Problems and Prospects: Looking to the Future*, 69 JUDICATURE 291, 293 (1986) (citing Fuller, *Forms and Limits, supra* note 456).

[462] *See, e.g.*, Galanter, *Judge As Mediator, supra* note 17, at 261 (providing statistics on the overwhelming number of filed cases that settle before trial); Rubin, *The Managed Calendar: Some Pragmatic Suggestions about Achieving the Just, Speedy, and Inexpensive Determination of Civil Cases in Federal Courts*, 4 JUST. SYS. J. 135, 137 (1978) (stating that in 1977 92% of federal district court cases did not go to trial).

[463] *See* Galanter, *Judge As Mediator, supra* note 17, at 257; Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 959-66 (1979) (examining the law's influence over the bargaining behavior of divorcing couples).

lution apparatus be available at a reasonable cost and that disputants be informed as to their rights and chances at trial. The role of advising people of their rights, however, may be at odds with the neutrality required of mediators and conciliators.[464]

Particularly when one side is weaker, the availability of a coercive legal system that efficiently delivers rights becomes critical.[465] The alternatives that are now in vogue may not, as their proponents contend, empower the community or empower the disputants by permitting them more control over their destiny.[466] If one has less power than an adversary, then it may require the power of the state, acting through the courts, to redress the imbalance. Professor Anthony Amsterdam put it this way:

> The plain fact is that, with very rare exceptions, in our culture, parties who are disadvantaged in litigation are even more disadvantaged in alternative dispute resolution settings when the courts are closed to them . . . . The potential assertion of legal rights, the continuing development by courts of a body of legal rights, and the possibility of recourse to a court to adjudicate legal rights are the only significant lever-

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[464] *See* Menkel-Meadow, *Judges and Settlement: What Part Should Judges Play?*, TRIAL, Oct. 1985, at 24, 27 (criticizing this conflict and other aspects of the settlement process); Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 106-17 (1981) (noting this conflict and arguing that mediation derives its strength from mediators' "commitment to a posture of neutrality").

[465] *See* Amsterdam, *Proceedings of the Forty-Fifth Judicial Conference of the District of Columbia Circuit*, 105 F.R.D. 251, 290-91 (1984) (noting the need for a coercive legal system in the context of group or class action litigation); Auerbach, *Alternative Dispute Resolution? History Suggests Caution*, 28 BOSTON B.J. 37, 39-40 (1984) (expressing a fear of a "two-track system that dispenses informal 'justice' to poor people with 'small' claims and . . . [j]ustice according to law will be reserved for the affluent . . . ."); Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1079-80 (1984) (going to trial helps to alleviate some of the influence a particular representative can have on a case); Singer, *Nonjudicial Dispute Resolution Mechanisms: the Effects on Justice for the Poor*, 13 CLEARINGHOUSE REV. 569, 574-76 (1979); L. Woods, Mediation: A Backlash to Women's Progress on Family Law Issues in the Courts and Legislatures (National Center on Women & Family Law 1985). There are several important values represented in civil adjudication that may be lost in some forms of alternative dispute resolution. *See, e.g.*, Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Service and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808, 1810, 1816, 1817, 1844 (1986) (adjudication reinforces values of individual worth and entitlement); Subrin & Dykstra, *Notice and the Right to Be Heard: The Significance of Old Friends*, 9 HARV. C.R.-C.L. L. REV. 449, 451-58, 474-78 (1974) (hailing the basic right to be heard and the protection given that right through adjudication).

[466] *See* S. GOLDBERG, E. GREEN & F. SANDER, *supra* note 17, at 5-6 (explaining that criticisms of ADR include feasibility, funding, quality, and possible abuses); Auerbach, *supra* note 465, at 39-40.

> age of the economically and politically weak against the economically and politically strong in forums outside the law.[467]

My point is not that alternative dispute resolution is bad. Rather, it does not help solve, and indeed resembles, an equity-based procedure that fails to concentrate on how law can be applied in a reasonably consistent and predictable manner. Moreover, if the purpose of the alternatives relates to enhancing community input and power, the judge/jury system may in fact contribute to achieving this goal. The jury represents the community, and the judge is obligated to enforce the law as it has been pronounced by the community through the legislature.

To their credit, the case management and alternative dispute resolution movements have forced us to focus on what we should expect from civil adjudication and dispute resolution generally.[468] Moreover, they have called attention to the fact that there exist substantially different types of cases that may warrant different processes. The discussion of the multi-doored courthouse, for instance, with different types of dispute resolvers and facilitators, is healthy, so long as we remember why the court was there to begin with.[469] Case management has also forced us to think about whether different cases should be managed differently. The comments to amended Federal Rule 16, for example, suggest that "[t]he district courts undoubtedly will develop several prototype scheduling orders for different types of cases."[470] Some of the state courts are experimenting with different tracks for different case types.[471] These developments may lead us away from trans-substantive procedure and back to the fundamental question of how procedure will help the application of substantive law in those cases where it is important that law be applied or that rights be vindicated.

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[467] Amsterdam, *supra* note 465, at 290.

[468] *See* S. GOLDBERG, E. GREEN & F. SANDER, *supra* note 17, at 149-88, 490-503; Resnik, *supra* note 17, at 413-41.

[469] *See* Sander, *Varieties of Dispute Resolution,* 70 F.R.D. 79, 111, 132 (1976) (relating a concern voiced by Judge Higginbotham "concerning the need to retain the courts as the ultimate agency capable of effectively protecting the rights of the disadvantaged").

[470] FED. R. CIV. P. 16; Advisory Committee's note to 1983 amendments to 1983 Amendment to FED. R. CIV. P. 16 (regarding Subdivision (b): "Scheduling and Planning").

[471] *See, e.g., Plymouth Trial Deadline Test may be Expanded,* 13 MASS. LAW. WEEKLY 1, 36 (Feb. 11, 1985) (experimenting with accelerated pretrial procedures in Plymouth County, Massachusetts); Text of Proposed Case Tracking Order, 13 MASS. LAW. WEEKLY 15 (Feb. 11, 1985) (proposing a system of civil case flow management in the Superior Court of Massachusetts).

C. *Neo-Classical Civil Procedure*

We need not look far for an approach to civil procedure that will help redress the imbalances resulting from equity's devouring of common law. Pound started his 1909 paper on "Some Principles of Procedural Reform" by asserting that "the controlling reason for a systematic and scientific adjective law must be to insure precision, uniformity and certainty in the judicial application of substantive law."[472] He added, "form is, if I may say so, the substance of adjective law."[473] As has been noted, however, Pound then proceeded to propose a formless equity system that would attempt to avoid the technicalities and rigor of procedural rules. He was followed by Clark, who made an art form of procedural formlessness.

The alternative to Clark's and Pound's wholesale acceptance of equity as a basis for procedural rules is a reconsideration of some of the theoretical underpinnings of the Federal Rules. The remainder of this section explores three possible starting points for such an effort: whether the rules should reflect a greater sensitivity for form, whether a procedural system should rely so heavily on court rulemaking as opposed to statutory law, and whether empowering judges rather than trusting juries should be a primary feature of a procedural system. This summary does not propose specific responses to these concerns. It does suggest, however, that arguments from the "losing side" in the uniform rules debate could provide guidance to those seeking to rescue the Rules of Procedure from equity's chaos.

Some who opposed the brave new procedural world of equity divorced from the common law took seriously the truism that form is the essence of procedure. The concern that modern procedure was in danger of going overboard, that oversimplified practice in a merged system would ultimately lead to chaos, was most prevalent in the work of Professor O.L. McCaskill, with whom Clark disputed for decades.[474] Clark had argued that the code pleading requirements were borrowed

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[472] Pound, *Some Principles, supra* note 171, at 388.

[473] *Id.* at 390-91.

[474] *See* C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 132-36, 141-46 (2d ed. 1947) [hereinafter C. CLARK, 1947 CODE HANDBOOK]; McCaskill, *Philosophy of Pleading, supra* note 30; McCaskill, *Actions, supra* note 15; Letter from Clark to William D. Mitchell (May 23, 1935), Clark Papers, *supra* note 192, at Box 108, Folder 41 (part of the correspondence during which Clark convinces Mitchell to have Clark named reporter for the soon-to-be-formed Advisory Committee to the Supreme Court, instead of Sunderland). For others who thought modern pleading reform may go too far, see E. SUNDERLAND, COMMON LAW PLEADING viii (1914); EXPERIENCE UNDER THE RULES, *supra* note 433, at 101, 617-51; Clark, *Code Cause, supra* note 146, at 836 n.37; Fee, *The Lost Horizon in Pleading Under the Federal Rules of Civil Procedure,* 48 COLUM. L. REV. 491 (1948).

from equity, and that the facts pleaded need only show at least one ground for relief.[475] The Federal Rule requirement of stating a "claim upon which relief can be granted" seems to connote the same concept.[476] McCaskill gave a more limited definition to a cause of action: "that group of operative facts which, standing alone, would show a single right in the plaintiff and a single delict to that right giving cause for the state, through its courts, to afford relief to the party or parties whose right was invaded."[477] Clark and McCaskill's debate was not simply a technical disagreement over the definition of a cause of action. McCaskill's restrictive and formalized meaning illustrates the divergent views of the appropriate posture for procedure. He thought that procedure was necessary to help deliver the substantive law through its confining, focusing, and defining functions. He did not think that procedure should step aside. McCaskill argued that Clark had "overworked" the feature of equity in the codes, and overlooked the "many features of the common law practice."[478] While he was sympathetic to the "flexibility" and "administrative convenience" that Clark stressed, McCaskill feared that

> [f]lexibility may be carried to such an extreme that our procedural machine will have no stability . . . . Leaving to the trial judge the fixation of the scope of the cause of action does not make for administrative convenience. It ignores one of the most useful purposes of the cause of action as a procedural unit in the action. It ignores the function of a pleading as an instrument of preparation for the trial. It proceeds upon the false assumption that a pleading properly partitioned in advance of trial can prove of no aid to parties or trial judge.[479]

McCaskill complained that trial judges were busy, and it was important that the judges could see each right-duty relation "clearly and instantly" so they could rule on the "materiality of evidence with precision," and charge the juries correctly.[480]

McCaskill disagreed with Clark's insistence that " '[o]ur application of legal principles to such facts when developed may be expected to take care of itself.' "[481] McCaskill had not found that legal principles

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[475] *See* Clark, *Code Cause, supra* note 146, at 817, 821, 828-29, 837.
[476] FED. R. CIV. P. 8(a)(2).
[477] McCaskill, *Actions, supra* note 151, at 638.
[478] *Id.* at 621.
[479] *Id.* at 620.
[480] *Id.*
[481] *Id.* (quoting Clark, *Code Cause, supra* note 146, at 831).

readily applied themselves at trial. Juries needed the help of smaller, discrete, understandable units, and judges were of varying ability. "[W]e cannot expect to improve the effectiveness of the jury by rushing to it half baked and undigestible facts."[482] "The problem of simplifying procedure is more than a problem of elimination. Pleadings may be made so simple, in the interest of the pleader and his client, that they cease to serve any useful purpose."[483] McCaskill insisted that the comparisons to equity did not make sense, for equity was different. For example, equity suits implicitly involved depositions taken out of court, broad discovery, and a skilled judge. There were also historic limitations concerning access to equity courts.[484] "During the trial no panel of jurors was being detained from their usual pursuits. Time was not, relatively speaking, an important factor."[485] "Sooner or later we will come to earth with the realization that the individual right has very definite limitations. In the chancery alone do we find one right having a harem of remedies."[486]

Connor Hall, a West Virginia lawyer who aggressively and articulately opposed the Enabling Act, argued that its proponents had not thought through how one actually accomplishes getting law applied in a case. Although he acknowledged that "[p]ractice is a mere tool," he urged that nonetheless "there must be a way to bring causes to the attention of the court; to adduce proof; to bear argument; to conclude the cause; to give the proper judgment; to take the proper steps for enforcing it . . . ."[487] Other able reformers, whom he labelled "geniuses and learned sages," had tried to solve the "same great problem of enforcing substantive rights and of adopting reasonable rules for the ascertainment of truth." He continued:

> Why should we, of the present . . . regard their labors as futile, throw their work in the discard and begin all over again? . . . The Majority Report of the Judiciary Committee of the Senate avers that the centaur "shall embrace all the merits and none of the vices of 'common law' and 'code' pleading, and that it is neither." Truly the millennium is at

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[482] *Id.* at 620.
[483] *Id.* at 621.
[484] *See id.* at 622.
[485] *Id.* at 626.
[486] *Id.* at 636.
[487] Copy of manuscript of Connor Hall, p. 5 (Oct. 15, 1926) mailed to the Editor, *American Bar Association Journal,* requesting publication, found in Walsh Papers, *supra* note 283, Box 302, Legislative File 1913-1933, "Procedural Bill" ca. 1926. This manuscript was later published as Hall, *Uniform Law Procedure in Federal Courts,* 33 W. VA. L.Q. 131, 134 (1927).

hand . . . ."[488]

To Hall, it seemed that the proponents of the Enabling Act ignored the real world.

> The attempt to obtain entire simplicity and lack of technicality through rules is a will-o'-the-wisp . . . . If a group of mariners tired of studying their complicated charts should decide to throw them away and adopt more simple maps, they would not thereby do away with the air and water currents through which they must pass, or the icebergs or the reefs in their course.[489]

Hall was right. Substantive law does not just apply itself. Its application must be aided by procedure. Historically, pleading had helped organize the case so it could be understood in terms of what legal consequences should flow from what circumstances. The idea of causes of action and elements helped lawyers and judges decide what was relevant. It is fanciful to pretend that if the law is not contained and focused it can still be applied in a manageable, replicable manner. As Pound said, "form . . . is . . . the substance of adjective law."[490]

If the proponents of the uniform federal rules had taken seriously the insight that law is not self-applying, and that form is needed to shape substance, they might have then explored which disputes made it desirable to have some kind of form. The period during which uniform federal rules were advocated may have frequently required courts to help interpret new statutes or develop old common law fields with more freedom and creativity than either the writ or code systems permitted. For cases that needed a more flexible process, they could have prescribed equity-like procedures. Other cases might have required, however, the application of known principles; in order to become law that can be more consistently applied in the future, new theories of recovery, as well as older rights, might have to be broken down into facts that comprise elements and elements that comprise causes of action. Clark himself had concluded in his federal court study that a sorting mechanism would be desirable, because complex cases involving the government called for different procedures than simpler cases.[491] Such an integration of procedure and substance, however, would have required a degree of technicality, categorization, and definition that was at odds with the simplicity and uniformity themes the proponents had devel-

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[488] *Id.* at 5-6, 10.
[489] *Id.* at 4.
[490] Pound, *Some Principles, supra* note 171, at 389.
[491] *See* Clark, *1934 Federal Courts Report, supra* note 332, at 19.

oped to propel their reform. Moreover, their insistence on court-made rules made it difficult to integrate procedure, in a substantive-conscious way, with the substantive law emanating from legislatures.

Other resistance to the Enabling Act centered on who should promulgate procedural rules: Congress or the Supreme Court.[492] Senator Thomas Walsh of Montana, a prominent member of the Senate Judiciary Committee, was the most forceful and effective opponent to the Enabling Act and uniform federal rules.[493] One of his earliest arguments was that procedural rulemaking belonged in the legislature, especially because hearings would be required to create a new procedure intelligently and effectively.[494] This remains a major issue, particularly if, as at common law, it is important to consider substantive rights simultaneously with process in order to increase the likelihood that rights will be enforced.[495]

Walsh's opposition was normally characterized by his unwillingness to force lawyers, particularly the "small practitioner and the country lawyer," to learn a federal procedure that is different from the procedural rules of their home states, accompanied by his fear that the simple code procedure of Western states would be somehow prejudiced by the complex procedure used in metropolitan areas, such as New York.[496] That characterization of Walsh's concerns, however, is incomplete—they were considerably more sophisticated and far-reaching. Like Pound, Shelton, Taft, Clark, and other Enabling Act proponents, his opposing position had both procedural and political dimensions.

Enabling Act supporters argued that if the procedure were created in court rules and not by statutes, then there would be fewer procedural arguments because the Supreme Court would be the final arbiter of the rules. If it saw faults in the Rules, moreover, the Court could

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[492] *See* S. REP. NO. 892, 64th Cong., 2d Sess. pt. 2, at 5-6 (1917) [hereinafter 1917 SENATE REPORT, Part 2.] The Report by Walsh in Part 2, entitled "Views of the Minority" evidently represented the majority opinion of members of the Senate Committee on the Judiciary. *See* Burbank, *supra* note 6, at 1064 n.220.

[493] *See* Chandler, *supra* note 1, at 481, 482. Walsh was not Chairman of the Senate Judiciary Committee, but he was instrumental over two decades in blocking passage of the Enabling Act. *See, e.g.*, 1917 SENATE REPORT, Part 2, *supra* note 492; Letter from Walsh to Robert Stone (Jan. 29, 1926), Walsh Papers, *supra* note 283, Box 281, Judiciary File; source cited *supra* note 284 (on Walsh accumulating evidence that the Conformity Act was not as disfavored as Enabling Act proponents claimed).

[494] *See* 1917 SENATE REPORT, Part 2, *supra* note 492, at 5-6. *But cf.* Walsh, *Rule-Making*, *supra* note 276, at 91-92 (Walsh would have had no "fault to find" with a state legislature designating its state Supreme Court to promulgate procedural rules.).

[495] *See supra* note 442 and accompanying text.

[496] *See* C. CLARK, 1947 CODE HANDBOOK, *supra* note 472, at 35; T. SHELTON, SPIRIT, *supra* note 198, at 194-96; 4 C. WRIGHT & A. MILLER, *supra* note 1, at § 1003, at 41; Chandler, *supra* note 1, at 481-82; Clark, *Handmaid*, *supra* note 302, at 83-84; *1920 Report*, *supra* note 246, at 514-15.

change them. The supporters also felt that somehow rules do not have to be followed, although statutes do.[497] Walsh pressed Shelton vigorously on these arguments during Senate subcommittee hearings, and never received a plausible answer.[498] For good reason, Walsh did not understand how anyone could draft a full set of procedural rules that would not cause substantial arguments among competing lawyers and require on-going interpretation. Nor did he understand how the Supreme Court could decide every procedural dispute, or how the Court could improve procedure better or faster than the legislature. Walsh implied that the Enabling Act proponents were inconsistent, because sometimes they complained that legislatures were too quick to change procedural rules, and now they were suggesting that the legislature did not act swiftly enough. Moreover, he could not understand why court rules would be less binding than statutes.[499] The nonbinding rule argument was especially elusive because the Enabling Act had a provision that made federal procedural rules supersede inconsistent congressional statutes.[500]

Walsh thought that "[t]he idea that troublesome questions of practice can be eliminated or even sensibly diminished by the plan proposed is utterly chimerical."[501] Arguments based on the simplicity of equity procedure did not impress him. He suggested that although the equity rules might sound simple, they were based on centuries of experience and required many volumes of works on both English and American practice to understand and to apply. He also asserted that the complexity of working under equity rules required a specialized equity bar.[502] Hence, Walsh could not understand how the new rules would in fact make litigation faster or more efficient. He insisted that the comparisons to simplified English practice were not persuasive, for one must look at what other elements in the legal culture might cause these results.[503] After a visit to England, Walsh was convinced that the more restrained habits of the English bar and the attitude of English judges,

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[497] *See 1915 Senate Hearings, supra* note 198, at 9-11; *1920 Report, supra* note 246. From 1920 through 1929, the reports of Shelton's ABA Committee remained essentially the same. *See* Burbank, *supra* note 6, at 1067-68.

[498] *See 1915 Senate Hearings, supra* note 198, at 8-11.

[499] *See id.*

[500] *See* Burbank, *supra* note 6, at 1052-54 & n.166.

[501] 1917 SENATE REPORT, Part 2, *supra* note 492, at 4.

[502] *See 1915 Senate Hearings, supra* note 198, at 12; Walsh, *Texarkana Address, supra* note 276, at 6; *see also* Letter from Walsh to Lew L. Callaway (Aug. 22, 1919) (writing that he can "see no reason to doubt that justice would be as readily, as effectively and as inexpensively administered if the practice of the state courts in equity cases were followed in the federal courts"); Walsh Papers, *supra* note 283, Box 281, Judiciary File.

[503] *See* Walsh, *Texarkana Address, supra* note 276, at 30-34.

trained to act swiftly and deliver opinions from the bench, were more important to speed and efficiency than procedural rules.[504]

The son of Irish immigrants, Walsh did not take kindly to persistent ABA emphasis on the glories of English judges and procedure.[505] Walsh was an egalitarian who did not want to enhance the power of judges—he trusted juries. As a leading progressive Democrat and a brilliant constitutional lawyer, he argued and wrote passionately for the confirmation of Brandeis to the Supreme Court, for judicial recall, against judicial control of juries, and for enhancing jury power in labor disputes.[506] His arguments against the Enabling Act not only included his repudiation of the simplicity theme; he did not see why a country so large as ours (Great Britain, he loved to point out, had "scarcely half" the area of his state, Montana) should have uniform rules, as different regions had different customs and needs.[507] In opposing the Enabling Act's grant of power to the Supreme Court to promulgate federal procedural rules, Walsh found it "quite strange that so many people have such an indifferent opinion of our legislative bodies and feel such security in a court that is removed as far as possible from the influence of popular opinion."[508]

A third concern voiced by some opponents to the Federal Rules concerned the effect a more powerful judiciary would have on trials. There were many more positive attributes of the common law pleading and trial system than the Enabling Act/Federal Rule proponents allowed. Walsh was properly concerned with the Supreme Court's inclination to reduce or eliminate oral argument.[509] Because it is a docu-

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[504] *See* Letter from Walsh to Mr. and Mrs. Hutchens (Oct. 5, 1925) (concluding that it "is the habits of our bar that need reforming, not the laws under which they act"); Walsh Papers, *supra* note 283, Box 281, Judiciary File.

[505] For biographical information on Walsh, see 19 DICTIONARY OF AMERICAN BIOGRAPHY 393-95 (D. Malone ed. 1936) [hereinafter AMER. BIOG.] (Thomas James Walsh); J. O'KEANE, THOMAS J. WALSH—A SENATOR FROM MONTANA (1955); TOM WALSH IN DAKOTA TERRITORY: PERSONAL CORRESPONDENCE OF SENATOR THOMAS J. WALSH AND ELINOR C. MCCLEMENTS (J. Bates ed. 1966) [hereinafter PERSONAL CORRESPONDENCE].

[506] *See* 62 CONG. REC. 8545-49 (1922); AMER. BIOG., *supra* note 505, at 393; PERSONAL CORRESPONDENCE, *supra* note 505, at xv; Bates, *Thomas J. Walsh: His Genius for Controversy*, 19 MONTANA: THE MAGAZINE OF WESTERN HISTORY 11-12 (October 1969); Walsh, *Recall of Judges* (July 28, 1911 Address), *reprinted in* S. DOC. NO. 100, 62nd Cong., 1st Sess. 3 (1911); Letter from Everett P. Wheeler to Walsh (Feb. 11, 1916), Walsh Papers, *supra* note 283, Box 223, File C-I; Letter from Walsh to Everett P. Wheeler (Feb. 14, 1916), *id.*; Letter from Walsh to O.F. Goddard (Jan. 3, 1915) (1916 is more likely actual date), *id.*; Letter from C.B. Nolan to Walsh (Sept. 3, 1919), *id.* at Box 281, Judiciary File; Letter from Walsh to C.B. Nolan (Sept. 11, 1919), *id.*

[507] *See* Walsh, *Texarkana Address*, *supra* note 276, at 26.

[508] 1917 SENATE REPORT, Part 2, *supra* note 492, at 6.

[509] *See* 62 CONG. REC. 8547, 8548 (1922).

ment-driven system, equity had a tendency to accumulate pages without focus.[510] Oral argument to a jury or appellate court, however, forces one to make choices and to narrow or focus the case. The need to instruct a jury forces a judge to explain the law, and, when it is done well, to use understandable categories and simple definitions. The jury trial permits a more spontaneous story to be told by the litigants.[511] The jury provides the counterforce of several lay people to the single, powerful, trial judge. A jury trial provides a combination of both community input and legal expertise. This is not to suggest that we exchange the all-powerful judge for the all-powerful jury, but rather that we permit each to balance the other.

At the 1938 Senate hearings that considered postponing the effective date of the uniform federal rules, there was serious concern expressed about the amount of judicial power contained in the new rules. Challen B. Ellis spoke to "the tremendous powers of the chancelor [sic] and dangers of abuse," and expressed fear that the new rules "practically strike down all the safeguards thrown around the action at law; and, in addition, eliminate many of the safeguards peculiarly appropriate to equity."[512] Kahl K. Spriggs complained that the discovery provisions went well beyond equity, and that the rights to jury trial and to having testimony presented openly in court were in jeopardy. He asserted,

> In general, the various powers of discretion reposed in the court under the new rules, together with the power of every litigant to try the case piecemeal, serve to whittle down the right of trial by jury. Heretofore the theory has been that a case may be submitted at one time through the medium of oral testimony and in open court, except in the infrequent instances in which depositions are used. Now, by a kind of inquisition conducted under rule 26, interrogatories under rule 33, discovery under rule 34, and admission of facts under rule 36, together with the consequences imminent under rule 37, there is left little further to be done.[513]

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[510] *See supra* notes 262, 399 and accompanying text.

[511] Lawyers do, of course, prepare witnesses for jury trials. But this is different from trial based primarily on documentary testimony.

[512] 83 CONG. REC. 8481, 8482 (1938); *see also The Rules of Civil Procedure for the District Courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (48 Stat. 1064) and on H.R. 8892: Hearings Before the House Comm. on the Judiciary*, 75th Cong., 3rd Sess. 150 (1938) (statement of Challen B. Ellis regarding Rule 16).

[513] 83 CONG. REC. 8481 (1938).

Surprisingly, the advocates of the Enabling Act and Federal Rules rarely made the traditional defense in favor of more judicial power in order to defend their implicit attack on the jury. One might have expected the argument that judges with more power under uniform rules would achieve more uniform results, that like cases will be decided more alike because judges are trained in law and less emotional than juries. It was Shelton, however, before Pound talked him out of it, who looked to procedure to help ensure that judges try to apply law in a more constant, nondiscretionary manner.[514] This was not, however, the argument of Enabling Act/Federal Rules advocates of the likes of Pound or Clark. It would have been difficult for them to propose an equity system with expansiveness and flexibility, while arguing seriously that their new procedure would help improve predictability or uniformity of result.[515]

CONCLUSION

The major change in American civil procedure over the centuries is that equity procedures have swallowed those of common law. Common law procedure represented, among other things, an attempt to confine and define disputes so that the law could be applied to relatively few issues by lay juries. Field and the Code Commissioners, in the mid-nineteenth century, moved in the direction of equity practice, but continually emphasized the restrictions of procedure. Judicial discretion was an anathema.

The movement toward equity procedures reached fruition in the Federal Rules of Civil Procedure and structural change cases that take advantage of a procedural mentality based in equity. The Field Code was born in the political, social, and economic climates of the nineteenth century. It was grounded first in liberalism and then in laissez faire economics and Social Darwinism. Similarly, the Federal Rules represented a conservative impulse to empower judges as a bulwark against progressive attacks, which was joined later by a legal realist, anti-formalist, pro-regulatory, New Deal mentality. Commentators as divergent as Roscoe Pound, Thomas Shelton, and Charles Clark had overlapping procedural agendas and visions.

The idea of law application and rights vindication lost prominence for a number of reasons. Legal formalism and procedures necessary for

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[514] *See supra* text accompanying notes 236-40.

[515] *But see* a portion of Shelton's testimony in 1915 that does speak about the importance of uniformity of law enforcement. *1915 Senate Hearings, supra* note 198, at 14.

rigorous law application obtained a bad name, particularly because the federal courts from about 1890 to 1935 used a formalized view of law to thwart social change. The legal realists raised doubts whether facts can ever be found, or whether law can ever be applied in a predictable manner. Much of the attack was against a formalistic, oracular view of law that allegedly used deductive logic to decide who had what rights and whether the government could constitutionally intervene. Legal realism, however, became skepticism about any type of legal categories and definitions. The answer of proceduralists such as Pound and Clark was to rely on expertise and judicial discretion. Give judges all the facts and a litigation package that includes every possible theory and every possibly interested party, and the judges—largely on an ad hoc basis—will figure out what the law and remedy should be.

As Dickens and others had known for centuries, equity procedure is slow and cumbersome, and has a high potential for arbitrariness. Over the years, those who have both stressed individual rights and liberties, and distrusted centralized power, have also criticized unbridled equity power. One has to be very careful here, for equity also had the admirable ability to act with a conscience and to create new rights. Such new rights, over time, tended to become defined and part of the more rigorous common law. Maitland and others warned that although equity and law worked well complementing each other, equity without common law had the capacity to be unwieldy or chaotic.

The modern procedural experience bears out this prophecy. Common law procedure, of course, had its own burdens. It is also obvious that many factors other than procedure have contributed to unwieldy litigation and undefined law. The point is that equity practice standing alone also has extreme burdens, and many of the complaints about modern law and contemporary court processes are related to equity's engorgement of common law practice.

Our infatuation with equity has helped us to forget the historic purpose of adjudication. Courts exist not only to resolve disputes, but to resolve them in a way that takes law seriously by trying to apply legal principles to the events that brought the parties to court. The total victory of equity process has caused us to forget the essence of civil adjudication: enabling citizens to have their legitimate expectancies and rights fulfilled. We are good at using equity process and thought to create new legal rights. We have, however, largely failed at defining rights and providing methods for their efficient vindication. The effort to defeat formalism so that society could move forward toward new ideas of social justice neglected the benefits of formalism once new rights had been created. The momentum toward case management, settlement,

and alternative dispute resolution represents, for the most part, a continued failure to use predefined procedures in a manner that will try, however imperfectly, to deliver predefined law and rights.

We need judges who judge as well as judges who manage. We need oral testimony, oral argument, and juries to balance documents, judges, and magistrates. This is not a plea for arid formalism that overemphasizes the value of form. Nor is it a plea for uncontrolled juries. This is a reminder that there is another rich tradition to draw upon, that the common law virtues of form and focus are necessary to help us develop methods that can realize our rights. It is a reminder that law and equity developed as companions, and that equity set adrift without the common law may in fact be Maitland's "castle in the air."[516] The cure for our uncontrolled system does not require the elimination of equity. It does require that we revisit our common law heritage.

[516] *See supra* note 431 and accompanying text.